MISSISSIPPI LAW JOURNAL

ARTICLES

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RECENT DECISION

CONSTITUTIONAL LAW—FIFTH AMENDMENT—TAKINGS CLAUSE—MANDATORY IOLTA PROGRAM CONSTITUTES PER SE TAKING

INDEX TO VOLUME 71

VOLUME 71 **SPRING 2002** **NUMBER 3**

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TABLE OF CONTENTS

ARTICLES

THE SUPREME COURT REJECTS THE NEW NONDELEGATION DOCTRINE: IMPLICATIONS FOR THE ADMINISTRATIVE STATE ..... *Frona M. Powell* 729

FAMILY LAW AT THE TURN OF THE CENTURY ..... *Deborah H. Bell* 781

NAVIGATING THE MAZE OF EVIDENCE OF CHARACTER AND OTHER CRIMES, WRONGS OR ACTS Mississippi Rules of Evidence 404 & 405 in Criminal Cases ..... *Tom R. Mason* 835

COMMENTS

REVEALING MISSISSIPPI YOUTH COURT: THE CONSEQUENCES OF LIFTING CONFIDENTIALITY REQUIREMENTS ON JUVENILE JUSTICE IN MISSISSIPPI ..... *Melissa C. Walker* 999

A SETTLEMENT OF *AYERS V. MUSGROVE*: IS MISSISSIPPI MOVING TOWARDS DESEGREGATION IN HIGHER EDUCATION OR MERELY A SEPARATE BUT 'MORE EQUAL' SYSTEM? ..... *Molly L. Mitchell* 1011

RECENT DECISION

CONSTITUTIONAL LAW—FIFTH AMENDMENT—TAKINGS CLAUSE—MANDATORY IOLTA PROGRAM CONSTITUTES PER SE TAKING . . . . . *John Moses* 1029

INDEX 1045

THE SUPREME COURT REJECTS THE NEW NONDELEGATION DOCTRINE: IMPLICATIONS FOR THE ADMINISTRATIVE STATE

Frona M. Powell[*]

I. INTRODUCTION

The proliferation of administrative agencies in the last century has constituted a "peaceful revolution" in government that affects the lives of everyone in the United States today.[1] Since the 1800s, Congress has passed a number of regulatory statutes creating different regulatory regimes and delegating rulemaking and adjudicatory powers to administrative agencies in order to achieve a variety of public policy goals.[2] Today, administrative agencies thrive at every level of American government and have become so pervasive that they are often called a "fourth branch" of government.[3]

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[*] Associate Professor of Business Law; Indiana University Kelley School of Business.

[1] The massive transfer of power from elected members of Congress to "comparatively faceless bureaucrats" has led to what some call a peaceful revolution in governmental form. Harold J. Krent, *Delegation and its Discontents,* 94 COLUM. L. REV. 710, 710 (1994) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)). Bureaucracy has been a feature of government since ancient China, Egypt and Rome, but "extensive bureaucracy is a rather recent development in American government." *See* GLEN D. ROBINSON ET AL., THE ADMINISTRATIVE PROCESS 2 (4th ed. 1993).

[2] In 1800, the federal government had a total civilian workforce of fewer than 5000 and there were only a handful of federal departments and bureaus. *Id.* at 4-6. In 1862, the Agriculture Department was created, and the Labor Department in 1898, which were major client agencies representing broad economic interest groups. *Id.* The Interstate Commerce Commission was created in 1887, and was important in administrative law because it was insulated more or less from political influence. *Id.* Popular history recognizes the significant impact of the New Deal era, "after which the momentum of government growth increased like water running down hill." *Id.*

[3] *Id.* at 34. Congress has relied extensively on delegation of policymaking

This transfer of legislative power from elected legislators to rulemaking bureaucrats has been accomplished through the process of "delegation"—the process by which Congress, or a state legislature, adopts enabling legislation to create regulatory programs and authorizes administrative agencies to implement those programs and policies through rulemaking and/or adjucatory power.[4]

Scholars have pointed to many reasons for the enormous growth of agency lawmaking in the latter part of the twentieth century. Among these reasons is the recognition that many modern regulatory programs, such as environmental protection programs and programs to protect public health and safety, necessarily address issues of increasing technological and scientific complexity. Congress often does not have the expertise to "fill in the blanks" to address these specific technological and scientific issues, and it therefore adopts broad delegating language directing the agency to do so.[5] In this way the agency, with its specialized experience and expertise, can develop and apply appropriate rules to further these broad congressional policy goals, and Congress can also avoid the need for frequent amendments to statutes as scientific and technological knowledge continues to develop and change in the future.[6] In addition to providing expertise regarding complex and rapidly changing issues, agencies, unlike courts, can

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authority to administrative agencies throughout the last century. "Agency regulations touch almost every facet of our daily lives, from the houses we live in to the food we eat, and they strongly influence, if not control, the course of American business." Krent, *supra* note 1, at 710.

[4] In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), Justice Marshall said, "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Wayman*, 23 U.S. (10 Wheat.) at 43. He continued:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

Id.

[5] ROBINSON ET AL., *supra* note 1, at 9-10. "In part, the technical problem is a matter of committing staff resources to develop the answers, but in many cases the problems can only be solved over some period of time, with experience." *Id.*

[6] *Id.*

also address problems prospectively rather than trying to compensate loss after the fact, which is the basis of most judicial relief.[7]

Some have also suggested that there are political reasons why Congress may prefer not to legislate in detail. In some cases it may be politically impossible to achieve a consensus on specific issues within complex legislative initiatives because "the difficulty of obtaining the required consensus among legislators rises as a function of the number of details on which agreement is needed."[8] Critics of delegation argue that Congress can avoid political accountability by delegating legislative powers to the Executive Branch with the result that democracy suffers.[9] By delegating those powers to agencies, the argument goes, legislators can claim credit for perceived benefits conferred by the legislation without incurring responsibilities for the costs and disappointments of agency implementation of those general policies.[10] Critics of delegation also express concerns that governmental agencies have too much discretion, that their powers are exercised by non-elected administrative bureaucrats with little or no direction from elected officials, and that the costs of regulation have been increasingly ignored.[11] Current calls for regulatory reform, which spring in part from the feeling that government agencies over-regulate business and individuals, and that agencies tend to become partisans for the regulatory goals they are to implement, reflect these concerns.[12]

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[7] *Id.*

[8] *Id.*

[9] *See generally* David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999).

[10] *See id.* at 740. According to Professor David Schoenbrod, a chief critic:

> The problem that legislators have with the Constitution is that they must take responsibility for both the benefits and costs of new laws. . . .
>
> Delegation has allowed legislators to rewrite the ground rules of democracy to help entrench themselves in office. They can pretend to deliver the best of everything to everyone by commanding agencies to promulgate laws to achieve popular statutorily prescribed goals. The statutes are framed so that legislators can skirt the hard choices.

Id. (footnotes omitted).

[11] *Id.*

[12] Howard M. Friedman, *The Oversupply of Regulatory Reform: From Law to*

In recent years, regulatory reform designed to address concerns that agencies exercise too much power has taken the form of both procedural and substantive requirements imposed on agency activity by the legislative, executive and judicial branches of government.[13] For example, Congress has passed a number of statutes that require agencies to follow certain procedures in decisionmaking, and the Executive Branch has imposed restrictions through executive order.[14] The courts have also imposed requirements on agency rulemaking under the principle of judicial review established in § 706 of the Administrative Procedure Act (APA).[15] This section governs judicial review of agency decisionmaking under an express set of legal principles.[16] The APA also establishes the basic

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Politics in Administrative Rulemaking, 71 NEB. L. REV. 1169, 1173 (1992).

[13] *Id.* at 1174-75.

[14] Chief among these is the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706 (2000). Other statutes affecting administrative agency rulemaking include the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (2000), requiring agencies to consider the potential impact of regulations on small business; the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520 (1994), which assigns to the Office of Management and Budget the responsibility for coordinating federal information policy; the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1994), directing agencies to consider potential environmental impact of major federal actions significantly affecting the quality of the human environment; the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-16 (2000), which regulates the formation and operation of advisory committees by federal agencies; the Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570 (2000), which establishes a statutory framework for negotiated rulemaking to formulate proposed regulations; and the Federal Register Act, 44 U.S.C. §§ 1501-1511 (1994), which authorizes uniform management techniques for the Federal Register. See generally Richard A. Merrill, *Introduction to Administrative Law Symposium*, 72 VA. L. REV. 215 (1986), for a discussion on the history of the APA.

[15] Courts' interpretation of the meaning of "arbitrary," "capricious," "abuse of discretion" and "not in accordance with law," as a standard of review under this section have changed over time. In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the United States Supreme Court construed the "arbitrary and capricious" test as follows: "To make this finding [whether the decision was arbitrary or capricious], the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Volpe*, 401 U.S. at 416.

[16] 5 U.S.C. § 706 provides that, when reviewing an agency action, the court shall:

> hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege

framework of administrative procedure governing agency action, including rulemaking.[17]

As agency rulemaking proliferates and the costs of agency action increases, a significant legal and policy question continues to arise: Under what principles should courts review agency rulemaking so that agencies have enough discretion to implement complex regulatory programs and yet assure they do not become a tyrannical fourth branch of government?[18] Judicial review of agency action, whether under statutory principles established by the APA, or under constitutional principles like the nondelegation doctrine, which limits delegation of power by Congress to an administrative agency, is fundamentally concerned with the appropriate relationship between the legislative, executive and judicial branches of government. Judicial review of statutes and rules made by administrative agencies under those powers delegated by Congress raise important constitutional separation of powers concerns.[19] Judicial review gives courts not only the signifi-

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> or immunity; (C) in excess of statutory jurisdiction, authority or limitations, or short of statutory rights; (D) without observance of procedure required by law; (E) unsupported by substantial evidence . . . on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706.

[17] 5 U.S.C. §§ 551-559, 701-706. *See* Benjamin W. Mintz & Nancy G. Miller, A Guide to Federal Agency Rulemaking 1 (2d ed. 1991).

[18] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J., 969, 994 (1992).

> [T]he problems of unconfined agency discretion and, more particularly, of excessive delegations of authority to agencies are not limited to the scope of congressional delegations or to the standards applied to test the necessary precision of regulatory laws. Indeed, the larger question, at least in terms of practical impact and unregulated agency overreaching, is how to control overly expansive readings by agencies of their mandates.

Ernest Gellhorn & Paul Verkuil, *Delegation: What Should We Do About It? Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 990 (1999).

[19] The power of judicial review was first recognized by the courts in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and judicial review of agency action is justified under principles established in that case. But there are valid arguments that the case for judicial involvement in administrative rulemaking is weaker than in the constitutional context. *See* Frank B. Cross, *Shattering the Fragile*

cant power to determine the standards to which agency action will be held, but also the power to strike down agency rules for failing to meet those standards.[20]

Recently, the United States Supreme Court issued an important opinion in *Whitman v. American Trucking Ass'ns*,[21] which addressed the issue whether new rules adopted by the Environmental Protection Agency (EPA), setting revised national ambient air quality standards for ozone and particulate matter under the Clean Air Act, were permissible under the constitutional nondelegation doctrine articulated by the court of appeals in that case. This paper examines that decision in light of the lower court's decision and relevant precedent, in order to consider what guidance the Supreme Court's decision gives on the difficult question articulated above. Under what standard should courts review agency rulemaking so that agencies have enough discretion to implement complex regulatory programs, such as establishing air quality standards under the Clean Air Act, and yet assure that the agency does not have unbridled discretion to act under a broad grant of statutory authority?

THE IMPORTANCE OF THE *AMERICAN TRUCKING* DECISION IN GENERAL

The importance of the Supreme Court's decision in *American Trucking* should be seen in context of the furor created by the lower court's decision which led to the grant of certiorari by the Supreme Court. In 1999, the District of Columbia Circuit Court of Appeals in *American Trucking Ass'ns v. EPA (American Trucking I)* remanded in part and vacated in part

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Case for Judicial Review of Rulemaking, 85 VA. L. REV. 1243, 1245 (1999) (arguing a need for legitimate justification for judicial review of rulemaking).

[20] There is a presumption of reviewability embodied in § 701 of the APA, which provides that the action of "each authority of the Government of the United States" is subject to judicial review, except where "statutes preclude judicial review" or "where agency action is committed to agency discretion by law." 5 U.S.C. § 701. In *Volpe*, the Court said the exception from review for actions "committed to agency discretion" is narrow and applicable only in "rare instances." *Volpe*, 401 U.S. at 410.

[21] 531 U.S. 457 (2001).

the EPA's promulgation of revised national ambient air quality standards for ozone and particulate matter under the Clean Air Act.[22] In doing so, the court of appeals relied on a relatively new judicially created test imposing standards on administrative rulemaking, a doctrine that has been called the "new nondelegation doctrine."[23] This doctrine was a variation of the nondelegation doctrine first invoked by the Supreme Court to invalidate statutes in the 1930s.[24] Under the new nondelegation doctrine, the court held that key provisions of the Clean Air Act, including those that give the EPA authority to issue national air quality standards, constituted an unconstitutional delegation of legislative power, at least as that law was interpreted by the EPA.[25]

The court of appeals' decision in *American Trucking I* immediately generated concerns about the constitutionality of the Clean Air Act in particular and the constitutionality of numerous other environmental and administrative laws in general.[26] The EPA Administrator called the court of appeals' decision "extreme, illogical and bizarre," and the "coalition of environmental, public health, and consumer groups urged the Justice Department to appeal," saying that it called into question one of the central tenets of the Clean Air Act, as well as many other environmental and safety laws, "that of setting and meeting health-based goals to protect the public and the environment."[27]

Some commentators suggested that the court of appeals in

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[22] Am. Trucking Ass'ns v. EPA (*Am. Trucking I*), 175 F.3d 1027, 1038 (D.C. Cir. 1999) (per curiam).

[23] *Am. Trucking I*, 175 F.3d at 1038.

[24] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935) (discussing whether Congress overstepped their authority to delegate in authorizing "codes of fair competition"); Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) (recognizing that there are limits of delegation of which there is no constitutional authority to transcend).

[25] *Am. Trucking I*, 175 F.3d at 1033.

[26] *See generally* Robert W. Adler, American Trucking *and the Revival (?) of the Nondelegation Doctrine,* 30 ENVTL. L. REP. 10233 (2000); Craig N. Oren, *Run Over by* American Trucking *Part I: Can EPA Revive Its Air Quality Standards?*, 29 ENVTL. L. REP. 10653 (1999).

[27] Steve France, *EPA, Lawyers, Scholars Take Measure of 'Nondelegation' Theory in Ozone Ruling*, 67 U.S.L.W. 2739, 2739 (1999).

American Trucking I invoked the new nondelegation doctrine more for "rhetorical flourish" rather than as a real attempt to revive the doctrine as a basis for vacating agency rules.[28] But in basing its decision on constitutional rather than administrative law principles, the court of appeals raised the legal stakes in the debate about the appropriate degree of discretion agencies should be permitted to exercise under broad statutory mandates. The court of appeals clearly said that it could and would be willing to strike down the agency's rulemaking on constitutional nondelegation principles if the agency were unable to come up with an "intelligible principle" to channel its application of the factors it used in setting limits on levels of ozone and particulate matter permissible under the Clean Air Act.[29]

The nondelegation doctrine relied on by the court of appeals in *American Trucking I* differs in some important ways from the earlier doctrine articulated by the Supreme Court in the 1930s.[30] Under the original nondelegation doctrine, in three prominent cases decided under Roosevelt's "New Deal," the Supreme Court overturned the delegation of lawmaking power under federal laws which were adopted by Congress in an attempt to cope with the Great Depression.[31] In one case, the Court struck down a section of the National Industrial Recovery Act of 1933 on the basis that Congress had failed to

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[28] Oren, *supra* note 26, at 10654.

[29] *See Am. Trucking I*, 175 F.3d at 1034.

[30] There is an important difference between the traditional nondelegation doctrine and the new doctrine articulated in *American Trucking I*. The traditional nondelegation doctrine invalidates enactments by the legislature, but the new doctrine is expressly directed at the Agency's interpretation of the statute. Oren, *supra* note 26, at 10656.

The new nondelegation doctrine has potentially large implications for regulatory policy. Under this doctrine, the agency is required to specify governing legal criteria under which it applies open-ended statutory terms. Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?* 98 MICH. L. REV. 303, 309 (1999). According to Professor Sunstein, the new doctrine is remarkable for several reasons, including the fact that the Supreme Court has not used the doctrine to invalidate a federal statute since the 1930s, and that it imposes on agencies (rather than Congress) the constitutional obligation to limit the agency's legal authority. *Id.* at 310.

[31] ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 17-18 (1993).

declare a policy and to set up a standard for the President's action under the Act.[32] Although the Supreme Court has never subsequently invalidated other federal laws on this basis, in a series of recent cases, the courts have developed and relied upon the new nondelegation doctrine. Under this doctrine, courts did not directly invalidate enactments by the legislature under the traditional nondelegation doctrine. Rather, they expressly applied the doctrine by focusing on the agency's interpretation of the statute. Under the new nondelegation doctrine, the courts took a hard look at the quality of the agency's explanation for its actions and they held that an unlawful delegation of legislative power to the agency could occur if the agency inadequately explained application of the statute and did not articulate an "intelligible principle" to channel its application of factors used to set rulemaking standards.[33]

Some critics of this new nondelegation doctrine said that its application by the court of appeals in *American Trucking I* and other cases suggested that the courts were substituting their own policy judgments for those of the agency.[34] They argued that despite the fact that the Supreme Court had expressly rejected the judicial role in "interpreting" the law to make policy decisions Congress itself declined to make, under the guise of the new nondelegation doctrine, courts were doing just that.[35] Several commentators argued that the APA pro-

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[32] In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court said Congress had provided no standards in delegating power to the National Recovery Act to establish "codes of fair competition" for the various businesses and industries covered by the Act. *A.L.A. Schechter Poultry*, 295 U.S. at 541-42.

[33] *See Am. Trucking I*, 175 F.3d at 1034.

[34] Some saw the decision as the court's requiring the agency to consider costs openly in setting air quality standards. *See, e.g.*, Oren, *supra* note 26, at 10654; Cass R. Sunstein, *The Court's Perilous Right Turn*, N.Y. TIMES, June 2, 1999, at A-25 (criticizing the decision as part of a trend toward "conservative activism").

[35] Oren, *supra* note 26, at 10658. The Supreme Court has stated: "[P]olicy arguments are more properly addressed to legislators or administrators, not to judges. . . . [R]esponsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ." Chevron U.S.A. Inc. v. Natural Res. Def. Counsel, 467 U.S. 837, 864, 866 (1984). *See* Cross, *supra* note 19, at 1264.

vides a better basis for judicial review, permitting courts to address concerns underlying the new nondelegation doctrine, without raising constitutional issues. They argued that courts can and should impose standards requiring reasoned rulemaking by the agency by relying on the requirement that failure to articulate an "intelligible principle" for its rulemaking is "arbitrary and capricious" under the APA.[36] According to one writer, "[t]he disadvantage of the *American Trucking I* approach is that it involves unnecessary, even reckless, use of the Constitution and does so in a way that threatens to raise too many questions about too many statutes."[37]

To understand the significance of the environmental issues as well as the legal issues raised by the decisions in *American Trucking I*, a review of the EPA's standard-setting in this case is necessary.

EPA'S AIR QUALITY STANDARDS FOR PARTICULATE MATTER AND OZONE

The Clean Air Act is one of the most important environmental statutes and its successes have been well-documented.[38] In the three decades after its adoption, the EPA reports that air pollution has been cut by 33% and acid rain by 25%, that cars are 95% cleaner, that chlorofluorocarbons that were depleting the ozone layer are being phased out, and that emissions of the six worst air pollutants dropped 33% from 1970 to 1997 despite a 31% increase in the United States population.[39] The EPA estimates that the benefits to human health, welfare and the environment have outweighed its costs forty to one.[40] But the Clean Air Act has also imposed significant costs on society, and many have suggested that the Act would be substantially improved by introducing balancing throughout the Act, thus permitting the EPA to take costs and other

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[36] Sunstein, *supra* note 30, at 330.
[37] *Id.* at 375.
[38] *Id.* at 306.
[39] Erin Kelley, *Fight Over Clean Air Act Continues*, FINAL ED., Feb. 7, 2000.
[40] *Id.*

environmental factors into account when issuing air quality standards.[41]

A cornerstone of the Clean Air Act is the National Ambient Air Quality Standards (NAAQS) program, which is the program through which the EPA sets standards for conventional industrial air pollutants.[42] The EPA has promulgated NAAQS for six criteria pollutants: sulfur dioxide, ozone, carbon monoxide, lead, nitrogen dioxide and particulate matter (PM).[43] Ozone is a principal ingredient in smog and can severely affect people with heart and lung diseases.[44] Particulates are solid or liquid particles suspended in the air which carry poison into the lungs.[45]

The EPA must establish both primary and secondary standards for these NAAQS.[46] Primary NAAQS are to be set at a level that, in the judgment of the Administrator, is "requisite to protect the public health" with "an adequate margin

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[41] Paul R. Portney, *Air Pollution Policy*, *in* PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 77, 116 (Paul R. Portney & Robert N. Stavins eds., 2d ed. 2000). Other recommendations include reducing new source bias, expanding emissions trading, improving the inventory of data on current emissions, and expanding and improving ambient monitoring. *Id.*

[42] 42 U.S.C. § 7408(a)(1) (1994). The Clean Air Act directs EPA to list pollutants that are present in the ambient air as a result of emissions that "may reasonably be anticipated to endanger public health or welfare." *Id.* § 7408(a)(1)(A).

[43] In order to establish the NAAQS for pollutants, the EPA must prepare a criteria document that reflects "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected" to result from the pollutant. *Id.* § 7408(a)(2).

[44] Individuals who are sensitive to ozone suffer a continuum of effects which are responsible for ten to twenty percent of all summertime emergency room visits related to respiratory problems. Oren, *supra* note 26, at 10661.

[45] "The new [PM] standards were based primarily upon concerns that air pollution was associated with an increased risk of mortality . . . ." *See* Lucinda Minton Langworthy, *EPA's Air Quality Standards for Particulate Matter and Ozone: Boon for Health or Threat to the Clean Air Act?*, 28 ENVTL. L. REP. 10502, 10503 (1998) (noting that others, including EPA's own scientific advisors, have pointed to "many unanswered questions and uncertainties associated with establishing causality of the association between PM2.5 and mortality") (quoting letter from George T. Wolff, Chair, Clean Air Advisory Committee, to Honorable Carol M. Brower (June 13, 1996)).

[46] 42 U.S.C. § 7409.

of safety."[47] Secondary NAAQS are to be set at a level that is "requisite to protect the public welfare from any known or anticipated adverse effects."[48] The Clean Air Act also establishes an independent scientific advisory body, the Clean Air Scientific Advisory Committee, to assist the EPA in developing appropriate NAAQS.[49] The Clean Air Act creates a partnership between the EPA and the states. Once the EPA has established NAAQS, the states determine which areas do not meet the standards and must then prepare implementation plans that provide for the attainment and maintenance of the standards.[50]

The EPA has a legal obligation to review the NAAQS every five years, although air quality standards have been altered only infrequently despite the Act's command.[51] In 1997, the EPA issued new PM and ozone NAAQS following a review as required by the Act.[52] The review of the PM standards led to regulations that addressed two types of PM separately: "coarse" and "fine" PM.[53] The new coarse PM standards varied little from the previous PM10 standards; the new PM2.5 standards focused on a specific subset of the material that had previously been regulated as PM10.[54] The EPA also replaced the one-hour 0.12 ppm primary and secondary NAAQS for ozone with eight-hour 0.08 ppm standards. These new standards were more stringent than the previous stan-

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[47] *Id.* § 7409(b)(1).

[48] *Id.* § 7409(b)(2).

[49] *Id.* § 7409(d)(2)(a). The committee consists of seven members including at least one member of the National Academy of Sciences, a physician and one person from a state air pollution control agency. *Id.*

[50] *Id.* § 7410.

[51] *Id.* § 7409(d)(1). EPA's revision represented only the second alteration in the ozone and PM standards since they were originally set in 1971. Oren, *supra*, note 26, at 10654.

[52] *See generally* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50).

[53] National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38654.

[54] Langworthy, *supra* note 45, at 10503, 10504.

dards for most parts of the country.[55] The new PM standards were based on concerns about the association of air pollution with premature mortality; the new ozone standards were designed to protect against lung function changes and respiratory changes.[56]

The EPA documented the massive impact of these new standards. The EPA estimated that 546 counties would not meet the new ozone rules and that 283 would violate the new PM rules.[57] Hundreds of new areas would be added to the list of non-attainment areas, and by the EPA's own estimates, an annual direct cost of $9.6 billion for ozone attainment and $37 billion for PM2.5 would be added to the cost of meeting the prior standards.[58] A 1997 policy study from the Reason Public Policy Institute estimated those costs to be as much as $90 to $150 billion annually.[59]

Following the revision of the NAAQS for ozone and PM by the EPA, concerns about the costs of EPA rulemaking under the Clean Air Act escalated, with many expressing concern that it was time to reexamine whether the only question relevant in establishing and revising NAAQS was the health effects of the given pollutant.[60] These concerns were driven by the costs of meeting the new standards.[61] The Clean Air Act does not directly address the factors that are relevant to the Administrator's judgment in setting a NAAQS requisite "to protect the public health with an adequate margin of safety."[62] The Administrator has determined that only health ef-

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[55] *Id.* at 10504.

[56] *Id.* at 10503, 10504.

[57] U.S. EVNTL. PROT. AGENCY, NATIONAL AIR QUALITY AND EMISSIONS TRENDS REPORT, 1996, at 2 (1998).

[58] Langworthy, *supra* note 45, at 10505.

[59] ANNE E. SMITH ET AL., COSTS, ECONOMIC IMPACTS AND BENEFITS OF EPA'S OZONE AND PARTICULATE STANDARDS 4 (Reason Public Policy Institute Policy Study No. 226, 1997), *quoted in* Langworthy, *supra* note 45, at 10505 n.60.

[60] "[D]oes it make sense, or is it even feasible, to say that national standards will be founded on an assessment of benefits alone, conducted in a cost vacuum?" Sunstein, *supra* note 30, at 308.

[61] *Air Quality Standards: Number of Counties Violating Air Rules Would Double Under Changes,* [Current Developments] 28 ENV'T REP. 550 (BNA) (July 18, 1997).

[62] *Id.*

fects—not costs—are relevant, and the courts have deferred to that reasoning, holding that other factors can be addressed during the implementation process.[63]

THE COURT OF APPEALS' DECISION IN *AMERICAN TRUCKING ASS'NS V. EPA*

In 1997, the EPA issued new NAAQS for PM and ozone.[64] Following issuance of the rules, American Trucking Associations, Inc., along with a number of other businesses and industries, filed a lawsuit challenging both new standards. They argued, among other things, that the construction of the Clean Air Act, on which EPA relied in promulgating the NAAQS, effected an unconstitutional delegation of legislative power.[65] In 1999, in *American Trucking I*, a three judge panel for the District of Columbia Circuit Court of Appeals vacated the established coarse PM standards and remanded the case to the EPA for further consideration of all standards at issue.[66] The court held that in setting new NAAQS for PM and ozone, the EPA had construed sections of the Clean Air Act so loosely as to render them unconstitutional.[67] The decision was subsequently upheld by the full panel of the court.[68]

Under the new nondelegation doctrine articulated and

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[63] Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir. 1980) ("[E]conomic considerations play no part in the promulgation of ambient air quality standards."); *see* Natural Res. Def. Council, Inc. v. EPA, 902 F.2d 962 (D.C. Cir. 1990).

[64] *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38856 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38652 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50).

[65] *Am. Trucking I*, 175 F.3d at 1034. Other issues included claims that § 7409(d) of the Clean Air Act allows EPA to consider costs; that EPA should have considered the environmental damage likely to result from the NAAQS financial impact on the Abandoned Mine Reclamation Fund; that the NAAQS revisions violated the National Environmental Policy Act, Unfunded Mandates Reform Act and Regulatory Flexibility Act, and that the 1990 revisions to the Clean Air Act limit EPA's ability to enforce new ozone NAAQS, and that EPA cannot ignore the possible health benefits of ozone. *Id.*

[66] *Id.* at 1057.

[67] *Id.*

[68] *See* Am. Trucking Ass'ns v. EPA (*Am. Trucking II*), 195 F.3d 4 (D.C. Cir. 1999).

applied by the court of appeals, a statute may be so vague or the delegation of power so broad that it forms an unconstitutional delegation of power. However, the statute (and agency rulemaking under its authority) can survive constitutional challenge if the agency can establish a determinate standard on its own for limiting its authority under the statute.[69]

The traditional nondelegation doctrine requires that Congress establish standards when it delegates power to administrative agencies.[70] The purpose of the traditional nondelegation doctrine is to assure that a primary legislative power remains in Congress and to limit bureaucratic tendencies to expand their power.[71] There is an obvious difference between this traditional doctrine and the new nondelegation doctrine articulated by the court of appeals in *American Trucking I*. The traditional nondelegation doctrine invalidates the legislature's enactments; the new doctrine focuses on limiting the agency's authority by requiring it to set standards in interpreting its authority under the statute.[72]

The court of appeals in *American Trucking I* said the agency did not meet the requirements of this new nondelegation doctrine because it had failed to identify and articulate an "intelligible principle" for concluding that its new ozone and PM standards were necessary to protect public health.[73] According to the court of appeals:

> Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement,

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[69] *Am. Trucking I*, 175 F.3d at 1038.
[70] AMAN & MAYTON, *supra* note 31, at 28.
[71] *Id.*
[72] Oren, *supra* note 26, at 10656.
[73] *Am. Trucking I*, 175 F.3d at 1034.

> though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?" . . . .
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> . . .[T]he agency rightly recognizes that the question is one of degree, but offers no intelligible principle by which to identify a stopping point.[74]

The environmental implications of the court of appeals' decision were significant. First, the decision struck a "body blow" at efforts by the EPA to address two of the most serious air quality problems in the United States.[75] The decision also seemed to call into doubt the constitutionality of a number of other environmental and administrative rules adopted under broad grants of authority in enabling statutes.[76] Like the language in the Clean Air Act, many other regulatory statutes contain broad language delegating power to the agency to set a level of regulation[77]

The court of appeals believed that the EPA had failed to provide a satisfactory explanation for its decision in setting the NAAQS for ozone and PM.[78] It said that the EPA's explanations for its decisions in setting those standards under the statute had an "ad hoc quality," even though the agency set forth a number of factors influencing its decision.[79] The court of appeals based its holding on constitutional grounds rather than relying on statutory principles of judicial review, specifically the "arbitrary and capricious" test under the APA.[80]

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[74] *Id.* at 1034, 1036-37.

[75] Oren, *supra* note 26, at 10654.

[76] The court upheld a regulation by the FCC of cable television under a statute with far less specific standards. *Am. Trucking I*, 175 F.3d at 1057 (Tatel, J., dissenting).

[77] The Clean Air Act contains language delegating power to the agency to set a level of regulation "requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (1994). The FCC regulation upheld in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), allowed regulation "as public convenience, interest or necessity requires." *S.W. Cable*, 392 U.S. at 178.

[78] *Am. Trucking I*, 175 F.3d at 1035. "*American Trucking*, like *Lockout/Tagout*, should be seen as resting largely on the court's desire for a better explanation from the agency." Oren, *supra* note 26, at 10657.

[79] *Am. Trucking I*, 175 F.3d at 1035.

[80] *Id.* However, the decision in *American Trucking I* could have been readily "explained as deciding that the Agency was arbitrary and capricious in setting the

Relying on the judicial review provisions of the APA, courts have policed the quality of agency explanations, requiring proof that the agencies have taken a "hard look" at the issue.[81] The court of appeals in *American Trucking I* could have decided that the agency's standard-setting for ozone and PM was "arbitrary and capricious" in violation of § 706 of the APA because it failed to sufficiently explain its decision in setting the ozone and PM standards.[82] By expressing its conclusion in terms of the nondelegation doctrine, some argued that the court used "a bigger hammer" than was needed.[83]

Some also think that in requiring the agency to articulate an "intelligible principle" for setting standards under the Clean Air Act, the court of appeals was suggesting to Congress and the EPA that it should reevaluate the criteria for setting ambient air quality standards under the Clean Air Act.[84] As noted previously, the EPA early on rejected cost as a criteria in setting NAAQS, and its interpretation has been upheld by the courts.[85] But many have argued that it is impossible to set ambient air quality standards without considering cost.[86] This is especially true in the case of ozone and PM, which are nonthreshold pollutants.[87] Under the law, the EPA must set standards "the attainment and maintenance of which in the judgment of the Administrator," based on air quality criteria documents, "and allowing an adequate margin of safety, are requi-

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ozone and PM standards in that [the] EPA did not sufficiently explain its decisions." Oren, *supra* note 26, at 10658.

[81] As articulated by the Court in *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), this requires the agency to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[82] Oren, *supra* note 26, at 10658.

[83] *Id.*

[84] *Id.* at 10654.

[85] Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1184 (D.C. Cir. 1980).

[86] *See* Sunstein, *supra* note 30, at 308 ("There is reason to think that at least in some cases, an understanding of costs has affected EPA's decision about appropriate standards . . . .").

[87] Oren, *supra* note 26, at 10661. In other words, there is no safe limit for ozone and any standard will allow some harm.

site to protect the public health."[88] For most pollutants, there are diminishing degrees of risk associated with diminishing degrees of exposure. The decision to choose a "safe" level is not a solely technocratic judgment, but must rest on a series of political, scientific, and economic judgments and compromises.[89]

There may be good reasons why costs should be considered in setting these standards under the Clean Air Act.[90] It may be impossible for the EPA to articulate an intelligible principle for setting ozone and PM standards at a particular level without addressing cost as a factor in the EPA's standard setting.[91] Some commentators have argued that the court of appeals applied a constitutional principle in *American Trucking I* to halt implementation of the ozone and PM rules because of concerns about the cost of implementing the new rules.[92] The court's difficulty in that case, they suggest, was less with the agency's reading of the statute than with how it exercised its authority.[93] But if cost is to be considered in implementing policy under the Clean Air Act, this is the kind of policy decision that should be made by Congress, not the courts.

Any review of environmental standards must recognize the problem of scientific uncertainty. Presumably, some effect from a level of pollution may be happening to someone, somewhere, at any moment in time. Exactly who should be protected and from what effects should they be protected? What are the actual costs of pollution? These are complex decisions, and they

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[88] 42 U.S.C. § 7409 (1994).

[89] Sunstein, *supra* note 30, at 308. Professor Sunstein adds:

> But does it make sense, or is it even feasible, to say that national standards will be founded on an assessment of benefits alone, conducted in a cost vacuum? If any improvement in ambient air quality would produce health benefits that are small but not trivial, isn't it clear that the improvement is justified if compliance costs are trivial, but not if the costs are extremely high?

Id.

[90] *Id.*

[91] Logic suggests an emission level of zero should be required under a health-based standard only. Oren, *supra* note 26, at 10660-61.

[92] Sunstein, *supra* note 30, at 308.

[93] *Id.*

often must be made in the face of scientific data which is contradictory, uncertain and changing.[94] Even risk assessment and cost benefit analysis rely on a wide range of disputed assumptions.[95] In the case of standard setting for ozone and PM, the EPA had to decide what the risk is, how much risk it is willing to accept and what effects the air quality standards should protect against.[96]

A dissenting judge on the court of appeals in *American Trucking I* pointed out that the EPA had adhered to a disciplined decisionmaking process to identify which health effects were "significant enough" to warrant protection, that it offered a reasoned explanation for the ozone and PM standards, and that it set the ozone and PM within ranges recommended by the Clean Air Scientific Advisory Committee.[97] Drawing a line in the face of such complex, voluminous and contradictory data, he said, is precisely the kind of agency policy choices that the courts have held can be delegated to an administrative agency.[98]

Furthermore, under the doctrine developed by the Supreme Court in one of its most important administrative law decisions in recent decades, *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[99] it is the function of the agency, not the courts, to administer the statute and to interpret any ambiguities present in the statute.[100] Some commentators have gone so far as to suggest that at least a portion of an agency's decisionmaking should be completely insulated from judicial review

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[94] *Id.* at 319-20. For example, new evidence indicated that the EPA should focus on particles that are 2.5 microns or smaller when setting standards for PM. *Id.* at 325. Data shows a correlation between concentrations of fine particles and increases in mortality and hospital admission. Langworthy, *supra* note 45, at 10503. But some researchers believe that factors other than particulate levels are responsible for it. Oren, *supra* note 26, at 10661.

[95] Sunstein, *supra* note 30, at 319-20.

[96] There is controversy, for example, about the harm caused by ozone and about effects the standards ought to protect against; there is also controversy about the significance of the reductions in health effects brought about by a tighter standard. Oren, *supra* note 26, at 10661.

[97] *Am. Trucking I*, 175 F.3d at 1059 (Tatel, J., dissenting).

[98] *Id.*; *see, e.g.*, Touby v. United States, 500 U.S. 160, 164-66 (1991).

[99] 467 U.S. 837 (1983).

[100] *Chevron*, 467 U.S. at 843-44; *see* Merrill, *supra* note 18, at 979.

because standard-setting by the agency inevitably involves policy-making.[101]

THE NONDELEGATION DOCTRINE

The origins of the nondelegation doctrine lie in the notion of democratic governance through separation of powers.[102] Article I, Section 1 of the United States Constitution vests "[a]ll legislative powers . . . in a Congress of the United States."[103] The Supreme Court has consistently held that Congress cannot abdicate or transfer to others this essential legislative function, to do so would be unconstitutional.[104] But the principle of nondelegation cannot be absolute. It would be clearly impossible for Congress to address all the complex issues in modern society today through federal laws alone. Such a strict interpretation of the doctrine would mean that Congress could not create federal agencies and empower them to administer policies, however limited or well-defined, by congressional man-

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[101] *See* Cross, *supra* note 19, at 1245-47.

[102] John Locke wrote in his *Second Treatise of Civil Government*:

> For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty and be safe and secure within the limits of the law; and the rulers too kept within their due bounds, and not be tempted by the power they have in their hands to employ it to such purposes, and by such measure as they would not have known, and own not willingly.
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> . . . .
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> The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them.

JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ¶¶ 137, 141 (J.W. Gough ed., 1946) (1690).

[103] U.S. CONST. art. I, § 1.

[104] *See, e.g.*, *Touby*, 500 U.S. at 164-67; Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) (finding a section of the National Industrial Recovery Act as an unconstitutional delegation of power).

date. The administrative state as we know it could not exist.

The Constitution vests the power to faithfully execute the laws in the Executive Branch.[105] But it is not so easy to separate executive and legislative functions, and often there is no clear line between the enactment of laws and the execution of those laws. The United States Supreme Court recognized in *Chevron* that when Congress delegates authority to an agency to implement a policy articulated in a statute, the agency is frequently required to interpret the language in the statute in order to implement the policy.[106] Thus, in order to enforce the policies underlying the statute, the agency makes rules and formulates policy to fill gaps left, implicitly or explicitly, by Congress.[107]

The long-standing rule is that so long as Congress has established "an intelligible principle to which the person or body authorized to [act] is directed to conform," there is no violation of the nondelegation principle.[108] Since the 1930s, no provisions of any federal statute have been invalidated by the Supreme Court under this theory. In a number of different cases, the Supreme Court has held that even in statutes with very broad delegations of authority, the statutes met the "intelligible principle" test set out above.[109] Many thought the doctrine had been laid to rest, but in recent years the doctrine has undergone a revival of sorts.[110]

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[105] U.S. CONST. art. II, § 3.

[106] *Chevron*, 467 U.S. at 843.

[107] *Id.* at 843-44. This is especially true for functions that call for professional expertise and competence. For example, "when legislators entrusted boards of regents with new state universities, statutes did not prescribe curricula, admissions standards, [or] grading systems." Hans A. Linde, *Structures and Terms of Consent: Delegation, Discretion, Separation of Powers, Representation, Participation, Accountability*? 20 CARDOZO L. REV. 823, 832 (1999).

[108] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[109] *See, e.g.*, *Touby*, 500 U.S. at 165. *See generally* Mistretta v. United States, 488 U.S. 361 (1989); Lichter v. United States, 334 U.S. 742 (1948); Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90 (1946); Yakus v. United States, 321 U.S. 414 (1944); Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944).

[110] During Roosevelt's New Deal, the Supreme Court in three cases held statutes or parts of statutes unconstitutional on nondelegation grounds. Those three cases were *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), *A.L.A. Schechter Poul-*

THE REVIVAL AND REINVENTION OF THE DOCTRINE

> *[T]he problems of unconfined agency discretion and, more particularly, of excessive delegations of authority to agencies are not limited to the scope of congressional delegations or to the standards applied to test the necessary precision of regulatory laws. Indeed, the larger question, at least in terms of practical impact and unregulated agency overreaching, is how to control overly expansive readings by agencies of their mandates.*[111]

The Benzene Decision

The 1980 Supreme Court decision *Industrial Union Department v. American Petroleum Institute* (the Benzene decision)[112] is cited as a case that signaled a potentially significant trend toward a revival and reinvention of the nondelegation doctrine.[113] In that case, the Supreme Court, in a plurality opinion, affirmed the Fifth Circuit Court of Appeals' judgment setting aside the Secretary of Labor's occupational safety and health standard for benzene as a carcinogen.[114] Justice Stewart, in the plurality opinion joined by Chief Justice Burger, and Justices Stewart and Powell, said that the one part benzene per million parts of air exposure limit under the Secretary of Labor's standard was not supported by appropriate findings.[115]

The Occupational Safety and Health Act of 1970 delegates broad authority to the Secretary of Labor to promulgate different kinds of occupational safety standards.[116] The Fifth Cir-

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try Corp. v. United States, 295 U.S. 495 (1935), and *Panama Refining Co. v Ryan*, 293 U.S. 388 (1935). This "trilogy" of cases was decided by the Supreme Court in the "politically charged context of the earliest New Deal legislation," and involved statutes that were unusual for their times. *See supra* notes 30-32 and accompanying text.

[111] Gellhorn & Verkuil, *supra* note 18, at 990.

[112] 448 U.S. 607 (1980).

[113] Sunstein, *supra* note 30, at 333.

[114] *Indus. Union Dep't*, 448 U.S. at 645.

[115] *Id.* at 638.

[116] *Id.* at 612. "The term 'occupational safety and health standard' means a

cuit held the regulation invalid on pre-enforcement review, concluding that the Occupational Safety and Health Administration (OSHA) had exceeded its standard-setting authority because it had not shown that the new benzene exposure limit was "reasonably necessary or appropriate to provide safe or healthful employment" as required by the statute, and that section 6(b)(5) of the statute "does 'not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of costs.'"[117] The principal question before the Supreme Court in the Benzene decision was whether exposure to benzene, which has been shown to cause cancer at high exposure levels, was a sufficient basis for a standard under which placed the most stringent limitation on exposure to benzene that is technologically and economically possible.[118]

In his opinion, Justice Stewart agreed with the Fifth Circuit's holding that the statute required the Secretary to find, as a threshold matter, that the toxic substance poses a significant health risk in the workplace, and that a new lower standard is therefore "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[119]

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standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (1994). If the standard concerns a toxic material, the Act provides:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

Id. § 655(b)(5); *see also Indus. Union Dep't*, 448 U.S. at 612.

[117] *Id.* at 613-14 (quoting Am. Petroleum Inst. v. OSHA, 581 F.2d 493, 502 (5th Cir. 1978)).

[118] *Id.* at 611.

[119] *Id.* at 614-15. Justice Stewart continued:

> Unless and until such a finding is made, it is not necessary to address the further question whether the Court of Appeals correctly held that there must be a reasonable correlation between costs and benefits, or

The following language in Justice Stevens' opinion is significant for the renewal and reinvention of the nondelegation doctrine:

> In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§ 3(8) and 6(b)(5), coupled with OSHA's cancer policy. Expert testimony that a substance is probably a human carcinogen—either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposures—would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.
>
> If the Government were correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 539, and *Panama Refining Co. v. Ryan*, 293 U. S. 388. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.[120]

This language suggests a reformulation of the traditional nondelegation doctrine, a rule that says that the Court will not find a delegation unconstitutional so long as the *agency* (rather

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whether, as the federal parties argue, the Secretary is then required by § 6(b)(5) to promulgate a standard that goes as far as technologically and economically possible to eliminate the risk.

Id. at 615.

[120] *Id.* at 645-46.

than Congress) articulates an "intelligible principle" in the statute which limits the agency's discretion.[121] Justice Stevens focused on the agency's interpretation of its statute, and the language of his opinion suggests that the agency's authority should be limited by the agency's construction of that authority under the statute. This position is in line with a general trend by courts since the 1970s to require administrative agencies to generate rules and criteria on which to evaluate agency rulemaking, a policy which has effectively shifted the requirements of statutory clarity in reviewing agency rulemaking to a requirement of administrative clarity by the agency.[122]

The Benzene decision was also important to the modern revival of the nondelegation doctrine because of language in the concurring opinion of Justice Rehnquist. Justice Rehnquist recognized the difficulty in determining whether the proposed health and safety standards for benzene would result in any appreciable benefits at all. He stated:

> This uncertainty, I would suggest, is eminently justified, since I believe that this litigation presents the Court with what has to be one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths. I would also suggest that the widely varying positions advanced in the briefs of the parties and in the opinions [of other Justices in the case] demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivitively, to this Court.[123]

According to Justice Rehnquist, the Court has expressly recognized the existence of and the necessity for limits on

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[121] *Id.*

[122] "The techniques of broad regulatory reform are often procedural in nature. Instead of mandating particular results, administrative agencies are required to institute a process that ensures consideration of specific approaches or values." Friedman, *supra* note 12, at 1175-76.

[123] *Indus. Union Dep't*, 448 U.S. at 672 (Rehnquist, J., concurring).

Congress' ability to delegate its authority to representatives of the Executive Branch.[124] He recognized that the rule against delegation of legislative power permits exceptions. But viewing the legislation at issue in light of the principles he discussed, including the principle that legislation "must be judged 'according to common sense and the inherent necessities of the governmental co-ordination,'" Justice Rehnquist believed it failed the test.[125] Justice Rehnquist stated:

> Viewing the legislation at issue here in light of these principles, I believe that it fails to pass muster. Read literally, the relevant portion of § 6 (b)(5) is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot. In the case of a hazardous substance for which a "safe" level is either unknown or impractical, the language of § 6 (b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Especially in light of the importance of the interests at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power.[126]

Justice Rehnquist recognized that the complexity of modern regulation means that in many instances, all Congress can do is articulate basic policy judgments while leaving implementation to executive agencies.[127] However, he believed a deferral to the Executive Branch on the most fundamental policy

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[124] *Id.* (Rehnquist, J., concurring). Justice Rehnquist quoted with approval this statement: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* (Rehnquist, J., concurring) (quoting Field v. Clark, 143 U.S. 649, 692 (1892)).

[125] *Id.* at 675 (Rehnquist, J., concurring) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).

[126] *Id.* (Rehnquist, J., concurring).

[127] *Id.* He noted that many decisions after *Panama Refining Co. v. Ryan* that have upheld congressional delegations of authority to the Executive Branch have done so on the theory that in technical fields, where the ground to be covered is large, the separation of powers doctrine requires that Congress lay down general policy standards, leaving the agency to refine those standards by filling in the blanks or applying the standards to particular cases. *Id.* (Rehnquist, J., concurring).

issue of how to "balanc[e] statistical lives and industrial resources" violated the principle of nondelegation.[128] According to Justice Rehnquist, the nondelegation doctrine serves three important functions:

> First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.[129]

Justice Rehnquist would have invoked the doctrine to invalidate a portion of the OSHA statute in this case.[130]

The "Lockout Tagout" Cases

The next important case in the modern history of the nondelegation doctrine involved an appeal of another OSHA regulation. The regulation at issue in *International Union v. OSHA (Lockout Tagout I)*[131] concerned procedures designed to reduce injuries caused by "ordinary industrial equipment that may suddenly move and cut or crush or otherwise injure a worker."[132] The District of Columbia Circuit Court of Appeals first

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[128] *Id.* at 685 (Rehnquist, J., concurring).

[129] *Id.* at 685-86 (Rehnquist, J., concurring) (citations omitted).

[130] *Id.* at 687-88 (Rehnquist, J., concurring).

> I would invalidate the first sentence of § 6 (b)(5) of the Occupational Safety and Health Act of 1970 as it applies to any toxic substance or harmful physical agent for which a safe level, that is, a level at which "no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to [that hazard] for the period of his working life," is, according to the Secretary, unknown or otherwise "infeasible."

Id. (Rehnquist, J., concurring).

[131] 938 F.2d 1310 (D.C. Cir. 1991) (*Lockout Tagout I*).

[132] *Lockout Tagout I*, 938 F.2d at 1312. "'Lockout' and 'tagout' are procedures

concluded that section 3(8) of the statute was the only evident source of constraints on OSHA regulations outside the area of toxic materials or harmful physical agents.[133] The court noted that the relevant language of the statute was "exceedingly vague," but the scope of the language had been narrowed by the Supreme Court's plurality opinion in the Benzene case.[134] The court read that opinion as a "manifestation of the Court's current general practice of applying the nondelegation doctrine mainly in the form of 'giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'"[135]

The court of appeals considered possible constructions of the statute and concluded that OSHA's interpretation of section 3(8), as a basis for the regulation, would constitute an unlawful delegation of legislative authority absent a more confined agency interpretation of the statute.[136] The court said it was difficult to imagine a broader construction of the statute than the one proposed by OSHA.[137] As interpreted by OSHA in its lockout tagout rulemaking, section 3(8) required a finding of "significant risk," and findings of economic and technological feasibility.[138] But the court said,

> on the agency's reading, feasibility works only as a ceiling, and not . . . as a floor; this was evidently the basis for the agency's rejection of union claims that more stringent rules than those adopted were feasible. The upshot is an asserted power, once significant risk is found, to require precautions that take the industry to the verge of economic ruin . . . or to do nothing at all. All positions in between are evidently equally valid.[139]

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designed to reduce these injuries. Lockout is the placement of a lock on an 'energy isolating device', such as a circuit breaker . . . . Tagout is the similar placement of a plastic tag to alert employees that the tagged equipment 'may not be operated.'" *Id.*

[133] *Id.* at 1312-16.

[134] *Id.* at 1316.

[135] *Id.* (citations omitted).

[136] *Id.* at 1317.

[137] *Id.*

[138] *Id.*

[139] *Id.* (citations omitted).

Clearly, the court believed that policy direction by Congress was needed: "Congress can readily articulate some principle by which the beneficent health and safety effects of workplace regulation are to be traded off against the adverse welfare effects."[140] However, "OSHA's reading of the Act finds no such direction."[141] Thus, the opinion written by Judge Williams, who was also the author of the court of appeal's opinion in *American Trucking I*, redefined the issue of nondelegation as one of statutory interpretation by the agency. It is the job of the agency, according to Judge Williams, to narrow its authority under the statute:

> OSHA's proposed analysis would give the executive branch untrammeled power to dictate the vitality and even survival of whatever segments of American business it might choose. . . . [T]he plurality's point [in the Benzene decision] is apt here: "[I]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view . . . ." At least if reasonable alternative readings can be found, OSHA's must be rejected as unreasonable.[142]

In a subsequent case, *International Union v. OSHA (Lockout Tagout II)*,[143] the court of appeals approved the agency's more restrictive statement of principles and held that the statute survived the nondelegation challenge.[144] OSHA rejected a "formal cost-benefit analysis" but adopted a statutory interpretation that required it to assure that the costs of the standards are reasonably related to their benefits, and required it to set a standard that met a "high degree of employee protection."[145] According to the court, this interpretation embodied "an adequate constraint on its discretion," and the court dismissed the

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[140] *Id.* at 1318.
[141] *Id.*
[142] *Id.*
[143] 37 F.3d 665 (D.C. Cir. 1994) (*Lockout Tagout II*).
[144] *Lockout Tagout II*, 37 F.3d at 670-71.
[145] *Id.* at 669.

petition for review.[146]

The court of appeals' decision in *American Trucking I* should be viewed in the context of the above cases. Following these cases, *American Trucking I* signalled a potentially significant trend toward the reinvention of the nondelegation doctrine in a new form.[147]

THE SUPREME COURT'S DECISION IN *WHITMAN V. AMERICAN TRUCKING ASS'NS*

In February 2001, the United States Supreme Court issued its opinion in *Whitman v. American Trucking Ass'ns*,[148] in which it affirmed the District of Columbia Circuit Court of Appeals' decision in part, reversed in part and remanded the case to the court of appeals.[149] The decision was significant for several reasons. The Court held that § 7409(b)(1) of the Clean Air Act does not permit the Administrator to consider implementation costs in setting NAAQS under the Act.[150] The Court held that § 7409(b)(1) does not unconstitutionally delegate legislative power to the EPA in violation of the delegation doctrine.[151] The Court also held that the EPA's implementation policy for ozone was unlawful, because the EPA's interpretation of the nonattainment implementation provisions in the law were unreasonable, and it instructed the EPA to develop a reasonable interpretation of the nonattainment implementation provisions insofar as they apply to the revised ozone NAAQS.[152]

The Supreme Court's decision in *American Trucking* is important for the application of the nondelegation doctrine in future environmental and administrative law cases. The Supreme Court in *American Trucking* firmly rejected the applica-

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[146] *Id.* at 667.

[147] Sunstein, *supra* note 30, at 310.

[148] 531 U.S. 457 (2001).

[149] *Am. Trucking*, 531 U.S. at 486. For a discussion of the implementation issues, see Craig N. Oren, *Run Over by* American Trucking *Part II: Can EPA Implement Revised Air Quality Standards?*, 30 ENVTL. L. REP. 10034 (2000).

[150] *Am. Trucking*, 531 U.S. at 486.

[151] *Id.*

[152] *Id.*

tion of the new nondelegation doctrine relied on by the court of appeals in this case, but it confirmed the court's authority to retain firm judicial control over administrative agencies by recognizing and applying the traditional nondelegation doctrine under the principle of judicial review.[153]

The language of § 7409(b)(1) is critical to the Court's holding in this case. The statute requires the EPA to set

> "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of § 7408] and allowing an adequate margin of safety, are requisite to protect the public health." The Court of Appeals held that this section . . . did not provide an "intelligible principle" to guide the EPA's exercise of authority in setting NAAQS.[154]

The court of appeals held that this section did not provide an "intelligible principle" to guide the EPA's exercise of authority in setting NAAQS.[155] The court of appeals found that "the EPA's interpretation [of this language] (but not the statute itself) violated the nondelegation doctrine."[156] The Supreme Court firmly disagreed on this point. Writing for the majority, Justice Scalia said:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. . . . [W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its

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[153] *Id. See generally* Robert L. Glicksman & Richard E. Levy, *Statutory Interpretation and Constitutional Delegation in* American Trucking, 69 USLW 2603 (2001).

[154] *Am. Trucking*, 531 U.S. at 465. *See generally* 42 U.S.C. § 7409(b)(1) (1994).

[155] *Am. Trucking*, 531 U.S. at 472 (citation omitted) (quoting 42 U.S.C. § 7409(b)(1)). The court of appeals had said the EPA "lack[ed] any determinate criteria for drawing lines. It has failed to state intelligibly how much is too much." *Id.* (quoting *Am. Trucking I*, 175 F.3d at 1034) (alteration in original).

[156] *Id.*

discretion a limiting construction of the statute.[157]

Justice Scalia continued:

> The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power . . . [is] internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.[158]

Thus, the Court rejected the new nondelegation doctrine while reaffirming that it is distinctly the province of the courts to ascertain whether a statute contains the necessary standards to survive a nondelegation challenge.[159]

Justice Scalia then examined the text of § 7409(b)(1).[160] He agreed that the question is the meaning of "requisite," and he accepted the government's definition that this "means sufficient, but not more than necessary."[161] This definition establishes limits that are, according to the opinion, strikingly similar to those approved in an earlier decision.[162] Thus, the Court concluded that the scope of discretion in § 7409(b)(1) was well within the outer limits of nondelegation precedents.[163]

Justice Scalia's opinion also expressly recognized that "the

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[157] *Id.* (second alteration in original) (citations omitted).

[158] *Id.* at 473 (emphasis in original).

[159] *Id.*; *see also* Glicksman & Levy, *supra* note 153, at 2606.

[160] *Am. Trucking*, 531 U.S. at 473.

[161] *Id.*

[162] *Id.* "[I]n *Touby v. United States*, [the Court held the statute] permitted the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was 'necessary to avoid an imminent hazard to the public safety.'" *Id.* The Supreme Court also said the language at issue in *American Trucking*

> also resemble[d] the Occupational Safety and Health Act provision requiring the agency to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health,"-which the Court upheld in *Industrial Union Dept. AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980) . . . .

Id.

[163] *Id.* at 474.

degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," and he recognized that Congress "must provide the EPA substantial guidance on setting air standards that affect the entire national economy."[164] But he said that "even in sweeping regulatory schemes we have never demanded, as the court of appeals did here, that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[165] In interpreting the requirement of "requisite" to mean "not lower or higher than is necessary—to protect the public health with an adequate margin of safety," he said, that requirement "fits comfortably within the scope of discretion permitted by our precedent."[166]

Under the Supreme Court's decision in *American Trucking*, the traditional nondelegation doctrine is still good law, even though the Court rejected the court of appeals' new nondelegation doctrine twist. The Supreme Court reaffirmed the requirement that a statute must contain an "intelligible principle" to limit agency discretion;[167] but it also applied a highly deferential standard of judicial review in applying the "intelligible principle" test under the traditional nondelegation doctrine, holding that statutory language in the Clean Air Act which mandated a standard "'requisite' . . . to protect the public health with an adequate margin of safety," sufficiently limited agency discretion by requiring it to set a standard "not lower or higher than necessary."[168]

A dictionary definition of the word "requisite" is "required," "necessary," "indispensable;"[169] and "necessary," in turn, is defined as "essential; indispensable."[170] The word "requisite" and words defining it may set a standard for the agency, but the statutory language does little to illuminate what are in fact the important policy questions at issue: What standard meets

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[164] *Id.* at 475.
[165] *Id.* (citation omitted) (alteration in original).
[166] *Id.* at 475-76.
[167] *Id.* at 472.
[168] *Id.* at 475-76.
[169] WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1218 (4th ed. 1999).
[170] *Id.* at 962.

the definition of neither "not lower or higher" than necessary? Under what test can the standard-setter meet that definition? The Court's holding in *American Trucking* suggests that the agency is in the best position to make that determination. When the Supreme Court exercises its power of judicial review of agency rulemaking this case indicates that the Court will continue to find that broad grants of statutory authority by Congress to agencies are constitutional under the nondelegation doctrine.

Although the Supreme Court specifically reaffirmed application of the traditional delegation doctrine in *American Trucking*, most broad grants of legislative authority should survive a delegation challenge under its holding in the case. The requirement of an "intelligible principle" remains the test of constitutional delegation, but the principle as applied in this case is one that permits Congress to give agencies wide latitude in implementing policy under the statutory scheme. Granting an agency authority to set standards "necessary" or "requisite" to protect public health is an intelligible principle, but it is so broad that it may do little to limit agency discretion, or to give the courts a basis on which to exercise meaningful judicial review.

Clearly, some authority must exercise control over agency decisionmaking, and that authority should be able to strike down agency rules when they are not reasonable, that is, not supported by scientific evidence or technological feasibility. Congress and the Executive Branch have the authority to control agency action through lawmaking, funding allocations, and through appointment and enforcement policies. Courts can best exercise authority over agency rulemaking by requiring the agency to support its rulemaking standards under a rational basis test as required by the APA.

CONTROLLING AGENCY DISCRETION UNDER THE ADMINISTRATIVE PROCEDURE ACT

The APA, passed in 1946, establishes the basic framework of administrative law and governs rulemaking by federal agen-

cies.[171] The APA imposes a number of procedural requirements on agency action. These procedures are designed to make the agency accountable to the public, to promote rationality and to enhance public acceptance of agency decisionmaking.[172] In interpreting and applying provisions of the APA in the review of agency rulemaking, the courts have expanded the scope of those procedural safeguards[173] The focus on regulatory reform in recent years has been insuring that the procedures utilized by the agency have been fair, rational and transparent. The approach adopted by Congress in the APA signals that broad delegations of authority to agencies will be tolerated, but that agency action will be controlled by procedural safeguards and reviewability by the courts.[174]

The APA specifically governs the scope of judicial review of agency action. Section 706 sets out the standards by which a court should judge the validity of agency action in reviewing its proceedings.[175] Under the APA, there is a presumption that agency actions are reviewable under § 701.[176] What are the purposes of judicial review of agency rulemaking? Judicial review has been justified for different reasons. First, it is argued, judicial review protects individuals from unreasonable action even when agencies have significant discretion.[177] Furthermore, in order to facilitate judicial review under the APA,

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[171] Mintz & Miller, *supra* note 17, at 1.

[172] Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 92 (1996). Other procedural reforms have been adopted to further these goals. *See supra* note 14 and accompanying text.

[173] *See, e.g.*, Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-17 (1971) (stating that a reviewing court must make a factual inquiry into the agency's rationale, thus giving agency decisionmakers a strong incentive to build a record to accompany their actions).

[174] *Id.*

[175] 5 U.S.C. § 706 (1994).

[176] *Id.* § 701. This section provides that the action of "each authority of the Government of the United States" is subject to judicial review, except where "statutes preclude judicial review" or "where agency action is committed to agency discretion by law." *Id.*

[177] Claudia Tobler, Note, *The Standard of Judicial Review of Administrative Agencies in the U.S. and EU: Accountability and Reasonable Agency Action*, 22 B.C. INT'L & COMP. L. REV. 213, 214 (1999).

the agencies must give reasons for their actions.[178] Requiring the decisionmaker to articulate the basis for its decisionmaking and make those reasons public is a cornerstone of democracy and serves the fundamental goal of transparency.[179]

The standard of review under § 706(2)(a) permits a court to set aside an agency action, findings and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[180] This is the traditional standard applied by courts in reviewing agency rules promulgated after informal rulemaking.[181] Courts applying this test usually focus on three issues: (1) whether the rulemaking record supports the factual conclusions upon which the rule is based; (2) the "rationality" or "reasonableness" of the policy conclusions underlying the rule; and (3) the extent to which the agency has adequately articulated the basis for its conclusions.[182] The courts have in a number of cases attempted to flesh out the meaning of "arbitrary and capricious" review.[183] While these decisions are often inconsistent, some generalizations are possible. The court should not substitute its judgment for that of the agency in making factual conclusions so long as there is a substantial basis in the record for the agency's conclusions, particularly when the issue is technical and involves scientific uncertainty and agency expertise.[184] A court will defer to policy judgments by the agency so long as they are based on "reasoned decision making."[185] This includes requiring the agency

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[178] *Id.* at 213.

[179] *Id.*

[180] 5 U.S.C. § 706(2)(a).

[181] Mintz & Miller, *supra* note 17, at 323.

[182] *Id.*

[183] *See, e.g.*, Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 626 (1986) (plurality opinion) (stating that a regulation will not be upheld if it is merely possible to "conceive a basis" for administrative action); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-44 (1983) (stating scope of review is narrow and "a court is not to substitute its judgment for that of the agency"); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983) (stating that a reviewing court "must generally be at its most deferential" when examining scientific determination made by an agency, within its area of special expertise).

[184] Mintz & Miller, *supra* note 17, at 333.

[185] *Id.*

to explain its basis and purpose and why it has rejected alternatives.[186] In the final analysis, the scope of judicial review under the APA gives judges substantial discretion to determine whether the agency rule meets the decidedly vague requirements of the "arbitrary and capricious" test. The terms embody the tradition of flexible, common law methods of review, and review under this standard leaves an "open field for the judiciary to assume a substantial presence in defining the contours of administrative power."[187] The disagreement among judges themselves about the appropriate degree of judicial deference to agency decisions is in part a reason for conflicting decisions reviewing agency action under the "arbitrary and capricious" test.[188]

Not everyone agrees that judicial review of agency rulemaking is appropriate. Arguments against judicial review seem to merge with arguments in favor of courts' granting agencies substantial discretion in rulemaking. These include concerns that legal issues simply cannot be disentangled from factual issues in the case, that law cannot be segregated from scientific and policy issues, and that judicial review is simply judicial second-guessing of agency policy decisions.[189] Others take the position that judicial review leads to ossification of rulemaking—that is, that aggressive judicial review by the courts has required agencies to go through increasingly burdensome procedures in order to prepare final rules, and, as a result, agencies will use other alternatives to take administrative

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[186] *Id.*

[187] Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1194 (1986), *quoted in* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,* 96 COLUM. L. REV. 612, 635 n.121 (1996).

[188] *Id.* at 636. "[C]ourts have not treated the open-ended judicial review provisions of the APA and analogous statutes as firm expressions of legislative direction. Rather, the courts often appear to draw upon their own sensibilities in giving content to such provisions." *Id.*

[189] Sunstein, *supra* note 30, at 352. "There is also a serious problem for the judicial role. . . . The notion that open-ended statutes become unconstitutional unless accompanied by agency specification would entail a far larger judicial role." *See generally* Cross, *supra* note 19 (discussing the abolition of judicial review of rulemaking).

action, moving away from rulemaking and toward adjudication to avoid legal challenges.[190] However, judicial review under the APA also serves a valuable function by requiring agencies to "articulate a satisfactory explanation for its actions, including a 'rational connection between the facts found and the choice made.'"[191] This requirement maintains the rule of law by insuring that an agency's explanation of its rulemaking will implicitly create standards to guide future agency actions and the agency will need to follow these standards or explain the need for departing from them.[192]

THE *CHEVRON* STANDARD: DEFERENCE TO AGENCY INTERPRETATIONS OF REGULATIONS

> The fifteen years since the Supreme Court handed down its ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, have seen a torrent of scholarship about the case, much of it suggesting or directly stating that the decision was one of the most noteworthy in the recent history of administrative law.
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> . . . .
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> A proper understanding of *Chevron* is vital to any analysis of the Court's function and the balance of power in our government.[193]

Before its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*[194] the Supreme Court granted a level of deference to an agency's interpretations of its own statute.[195] The Court reasoned that an agency's interpretation of

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[190] Christopher H. Schroeder & Robert L. Glicksman, Chevron, State Farm, *and EPA in the Courts of Appeals During the 1990s,* 31 ENVTL. LAW REP. 10371 (2001) (taking position that EPA rulemaking actually increased during the 1990s, in contrast to the prediction of ossification).

[191] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 158 (1962)).

[192] Oren, *supra* note 26, at 10657-58.

[193] John G. Osborn, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 HARV. J. ON LEGIS. 115, 115, 118 (1999) (footnotes omitted).

[194] 467 U.S. 837 (1984).

[195] *See generally* NLRB v. Hearts Publ'ns, Inc., 322 U.S. 111 (1944).

the statute it is charged with administering deserves respect because "[e]veryday experience in the administration of the statute gives [the agency] familiarity with the circumstances."[196] In *Chevron,* the Court gave a stronger rationale for deference by courts to an agency's interpretations of its statutes—that when a statute is silent or ambiguous, Congress has delegated the policymaking authority necessary to fill the gap to the agency.[197]

Chevron itself involved a challenge to the EPA's definition of "stationary source" under the Clean Air Act.[198] The EPA defined the term to refer to an entire manufacturing plant (under a "bubble theory"), rather than individual point sources in the plant.[199] The Supreme Court ultimately upheld the rule and in the course of the decision set out the following principle when reviewing an agency's construction of a statute it is charged with implementing: Has Congress directly spoken to the precise question at issue?[200] If so, the court must "give effect to the unambiguously expressed intent of Congress."[201] If not, that is, if the statute is "silent or ambiguous" with respect to the specific issue, the question is whether the agency's interpretation is "permissible"—defined as a "reasonable interpretation."[202]

The *Chevron* decision has been interpreted by courts and commentators to create a presumption that Congress has opted for implementation of the statutory mandate by the more politically accountable administrative agency and not the less accountable reviewing court.[203] The decision also recognizes that agencies are more familiar with and sophisticated about the statutes they administer, that the agency needs flexibility in

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[196] *Hearst Publ'ns*, 322 U.S. at 130.

[197] *Chevron*, 467 U.S. at 843; *see* Melanie E. Walker, *Congressional Intent and Deference to Agency Interpretations of Regulations,* 66 U. CHI. L. REV. 1341, 1346 n.20 (1999) (discussing agency interpretations of statutes after *Chevron*).

[198] *Chevron*, 487 U.S. at 837.

[199] *Id.*

[200] *Id.* at 843.

[201] *Id.*

[202] *Id.* at 843-44.

[203] Manning, *supra* note 193, at 638-48.

addressing problems as they develop in administering a complex regulatory scheme, and the agency is more politically accountable for its choices than a court because it falls under the incumbent executive administration.[204]

There is a relationship between the principles underlying the Supreme Court's decision in *Chevron* and the constitutional nondelegation doctrine. Many believe that the *Chevron* decision rested on a separation of powers analysis, in that in *Chevron* the Supreme Court acknowledged the propriety of placing regulatory functions in the hands of the Executive Branch and also recognized limits on the appropriateness of judicial policymaking.[205] Others have read *Chevron* as creating an across-the-board presumption that ambiguity in the statute meant that Congress intended to grant discretion to the agency.[206] Still others have argued that the rule is a "self-generated principle" that should be employed only when the facts of a particular case indicate an implicit delegation by Congress to the agency to fill the gaps in the statute.[207]

The *Chevron* decision recognizes the principle that to effectuate policy goals in the administrative state most efficiently, agencies must interpret and implement the statutes that establish their authority. This principle solidifies the central role agencies play in policy development in the modern administrative state.[208] *Chevron* recognizes that the choice among possible interpretations of ambiguous statutory language is a policy decision—one which the agency, not the judiciary, chooses.[209]

Under the Supreme Court's holding in *Chevron*, in order to determine whether an agency's interpretation of its statute is permissible, the court first determines whether the intention of Congress is clear.[210] If not, the agency's interpretation is enti-

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[204] Krent, *supra* note 1, at 722-23.

[205] Osborn, *supra* note 193, at 119 n.14.

[206] Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071, 2087-88 (1990).

[207] Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1292-93 (1991).

[208] Osborn, *supra* note 193, at 118.

[209] *Id.* at 120.

[210] Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44

tled to deference by the courts so long as its interpretation is a reasonable one.[211] *Chevron* recognizes that in cases of statutory ambiguity, Congress has impliedly delegated authority to the agency to fill that gap.[212] The question whether Congress has clearly articulated the scope of agency authority under a statute to implement broad policy goals is also question of statutory interpretation, because Congress can only articulate the scope of agency authority in its enabling legislation. *Chevron* does not apply to the extension of an agency's jurisdiction beyond its core powers, and courts recognize no presumption of deference to the agency's interpretation of the constitutionality of a statute under the delegation doctrine. When a court reviews an agency's interpretation of the scope of its authority under the statute under the constitutional nondelegation doctrine, there is no *Chevron* presumption of deference to the agency's interpretation of whether Congress exceeded its authority in delegating power to the agency.[213]

THE NONDELEGATION DOCTRINE REVISITED

Many concerns about courts' use of the nondelegation doctrine to vacate or remand agency rules for further rulemaking focus on the question whether delegation of legislative power from Congress to administrative agencies violates fundamental democratic principles. The first important function of the nondelegation doctrine articulated by Justice Rehnquist in the Benzene decision is that it ensures that important choices of social policy are made by Congress.[214]

In his book, *Power Without Responsibility*, David Schoenbrod argues that important choices of social policy should be made by Congress, not administrative agencies, and that "[d]elegation can shield our elected lawmakers from blame

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(1984).

[211] *Chevron*, 467 U.S. at 837.

[212] *Id.* at 843.

[213] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); *Am. Trucking I*, 175 F.3d at 1027 (neither applying the *Chevron* test to determine whether Congress or the agency had exceeded its constitutional doctrine).

[214] Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

for harming the public," both for failing to achieve the purpose of a regulatory program, but also for imposing unnecessary costs as a result of the program.[215]

> In making laws, Congress has to allocate both rights and duties in the very course of stating what conduct it prohibits, and so must make manifest the benefits and costs of regulation. When Congress delegates, it tends to do only half its job—to distribute rights without imposing the commensurate duties. So it promises clean air without restricting polluters and higher incomes for farmers without increasing the price of groceries.[216]

Critics like Schoenbrod argue that as a matter of public policy society should reconsider and reject the wholesale delegation of policymaking authority by Congress to administrative agencies. He rejects the argument that policymaking by agency officials avoids influence-peddling in Congress because agency rulemaking is insulated from political pressure and lobbying efforts by the few; Schoenbrod argues that agency heads are usually not apolitical and that, in fact, the agency itself is often "closely linked with the industry it regulates."[217] According to Schoenbrod, delegation "undercuts the government's capacity to resolve disputes through compromise."[218] Delegation of legislative authority to non-elected bureaucrats allows social policy disputes to be prolonged and keeps standards of conduct by decisionmakers murky; and it renders elected officials "less responsible to the people and less responsive to their interests."[219]

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[215] DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9 (1993).

[216] *Id.* at 9-10.

[217] *Id.* at 13; *see* Friedman, *supra* note 12, at 1173 (proposing that agencies become partisans for the regulatory goals they seek to implement).

[218] SCHOENBROD, *supra* note 215, at 12.

[219] *Id.*

> [M]embers of Congress run the risk of voter displeasure if they overtly sell regulation to special interest groups. For this reason, they covertly confer benefits on groups by delegating regulatory authority to agencies, knowing that the exercise of such authority will ultimately line the pockets of influential constituents or special interest groups at the expense of their constituency as a whole.

In his opinion, delegation shortcircuits the democratic option of refusing to reelect legislators who make laws we dislike.[220] He sees in delegation threats to liberty,[221] and fears that delegation undermines protection of the public because the current choice of direct, complex regulation is bad for people.[222]

On the other hand, many argue that it is not good policy to require Congress to establish regulatory schemes in detailed statutes. From a political point of view, requiring more specificity in legislation might well lead to bad policy and more, not less, influence by private interest groups.[223] Nor is it clear that policymaking has improved when Congress does legislate with particularity.[224] For example, detailed and complicated legislation like that of the 1990 amendments to the Clean Air Act most certainly increased the possibility of statutory ambiguity and internal conflict within the law itself.[225]

Proponents of the nondelegation doctrine seem to assume that more detail in the statute is desirable. In fact, requiring

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Krent, *supra* note 1, at 713 (citation omitted).

[220] SCHOENBROD, *supra* note 215, at 14.

[221] *Id.* at 15. "Liberty is infringed when government uses its coercive power for a private as opposed to a public purpose." *Id.*

[222] *Id.* at 17. "[Delegation] severs the link between the legislator's vote and the law, upon which depend both democratic accountability and the safeguards of liberty provided by Article I." *Id.*

[223] Merrill, *supra* note 18, at 1031.

[224] Sunstein, *supra* note 30, at 338.

[225] Merrill, *supra* note 18, at 1031. For example, one of the important nondelegation issues in *American Trucking* involved an issue of statutory interpretation. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462 (2001). The question was whether specific 1990 revisions to the Clean Air Act limited EPA's ability to enforce new ozone NAAQS. *Am. Trucking*, 531 U.S. at 463, 464. The court of appeals held that as a matter of statutory interpretation, the EPA could enforce revised ozone standards only under subpart 2 of part D of the Clean Air Act. *Id.* To decide this issue, EPA was required to interpret part D of title I, the portion of the Clean Air Act that establishes detailed requirements for nonattainment areas. *Id.* at 462. The majority of the court seems to hold that "in any situation of conflict between subpart 1 and subpart 2, the requirements of subpart 2 apply to implementation of the revised ozone primary standard," and that EPA cannot use subpart 1 to require additional measures to implement the new ozone standard. Oren, *supra* note 149, at 10038. Such a holding, argues one commentator, "conflicts with the Clean Air Act's language, structure, and legislative history." *Id.* at 10034.

Congress to write detailed statutes addressing singular issues of policymaking not only obfuscates policy, it adds to the "complexity—and incomprehensibility—of the legal system."[226] There are other reasons to encourage delegation of rulemaking authority to agencies. They are created to develop and exercise special expertise in a particular policy area. Delegation of rulemaking authority permits those experts to address changing circumstances and model policies in light of the most recent scientific and technological knowledge available.[227]

As to the argument that delegation of legislative authority to agencies obviates principles of democratic governance and liberty, there are in fact many features of bureaucracy that encourage democratic decisionmaking.[228] Agencies, unlike courts, are politically accountable through the executive branch of government. Congress and the Executive Branch also continue to control agencies through budget-making and countless committees which review agency actions.[229] Because they are accountable to Congress and the Executive Branch, agencies are also subject to the influences of public opinion and political pressure.[230] Furthermore, agencies have a comparative advantage in discerning legislative intent over courts because they possess the experience and technological and scientific expertise necessary to interpret and apply the policies established in the enabling legislation.[231] As a result, interest groups are less able to be influential in agency rulemaking than they can in litigation because private parties determine the issues in litigation.[232] Unlike litigation, the procedural requirements of the APA apply to agency rulemaking, and these rules mandate transparency and notice and opportunity to be heard by all interested parties.[233]

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[226] Merrill, *supra* note 18, at 1031.

[227] Sunstein, *supra* note 30, at 338.

[228] Krent, *supra* note 1, at 723.

[229] *Id.* at 722.

[230] Sunstein, *supra* note 30, at 370.

[231] Manning, *supra* note 187, at 647.

[232] Krent, *supra* note 1, at 730.

[233] Litigation is also highly vulnerable to manipulation by outside interest groups, and unlike agency rulemaking, consent decrees may be negotiated in secret. Cross, *supra* note 19, at 1247.

Policy concerns which underlie the second and third functions of the nondelegation doctrine, as articulated by Justice Rehnquist in the Benzene decision, include the need to promote accountability and to encourage sound deliberation by the agency.[234] Requiring the agency to establish and follow an "intelligible principle" in rulemaking promotes predictability by the agency, consistency and protects against the exercise of arbitrary "ad hoc" discretion, a principle that goes to the basis of democratic governance.[235]

Although the Supreme Court rejected the new nondelegation doctrine in *American Trucking*, it did not reject the traditional nondelegation doctrine nor the goals of the doctrine. Courts presumably will continue to implement these goals by requiring Congress to articulate an "intelligible principle" in statutory delegations of authority to limit agency discretion. However, by requiring the agency to provide a rational basis for its decisionmaking under the "arbitrary and capricious" language of § 706 of the APA, courts can better enforce the goals of the traditional nondelegation doctrine. When courts elevate the requirement of reasoned decisionmaking to the level of constitutional doctrine to achieve these goals, they threaten the balance of power between the judiciary, Congress, agencies and the courts.

The Supreme Court's decision in *American Trucking* may be an implicit recognition of the impracticality of invalidating agency rulemaking under a constitutional doctrine like the nondelegation doctrine. Many of the problems addressed in modern regulation are so complicated and so technical that it is impossible for Congress to do much more than articulate basic

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[234] Sunstein, *supra* note 30, at 337.

[235] Gellhorn & Verkuil, *supra* note 18, at 989 (citation omitted).

> [A] revived delegation doctrine, which requires legislation to include 'intelligible principle[s]' for measuring the scope and not just the goals of legislation, could play a critical role in confining agency discretion and ensuring agency accountability. In this way, limits on vague and standardless delegations should be a first principle of constitutional government.

Id.

policy goals in its enabling legislation.[236] Government today is much more complex than in the earliest days of the Republic, and it is too late to turn back the clock and return to the days of the pre-bureaucratic state.[237] Requiring Congress to legislate in detail would substantially increase the workload of an already overworked Congress.

Another significant issue is the fact that the nondelegation challenge could be used to attack a wide number of federal regulatory statutes. The vast majority of delegations are "goals" statutes, and there is little doubt that a number of these would be vulnerable to the same attack against rulemaking made by agencies under the provisions of other laws.[238]

Other arguments against application of the nondelegation doctrine to agency rulemaking involve general concerns about judicial review of agency actions. Like agency administrators, judges are unelected members of a "professional elite," but they usually lack the technical or scientific skills and special expertise in the specific policy area of agency rulemakers.[239] Evidence suggests that judges are disingenuous when they maintain that they, unlike legislators and agency administrators, are not influenced by their particular ideological points of view.[240] Judges do not review laws passed by Congress to insure that its procedures or record are adequate, nor do they impose on Congress the requirement that its decision be "reasoned."[241] There is little justification for applying different rules to administrative rulemaking, thereby intruding on the exercise of legislative powers expressly or impliedly delegated by Congress to the exercise of administrative agencies.

Furthermore, the nondelegation doctrine itself is difficult,

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[236] Krent, *supra* note 1, at 711.

[237] *Id.*

[238] *See id.* at 712. Almost every piece of legislation could be evaluated on this basis. *Id.* at 750.

[239] Cross, *supra* note 19, at 1274. "[J]udges are singularly ill-equipped to render decisions regarding issues of policy and/or fact." *Id.* at 1264.

[240] *Id.* at 1281. The decision on rehearing in *American Trucking* was clearly along partisan lines. *See id.* (discussing that often judges' interpretations of laws are based upon their own ideological predilections of what the law should be).

[241] *Id.* at 1330-31.

if not impossible, to administer.[242] Courts have yet to come up with a coherent test for determining when an agency's interpretation of its statutory authority is limited enough.[243] In reality, the difference between what is a permissible delegation of authority and what is not a permissible delegation is one of degree, not of kind.[244] The issue should be viewed as one aspect of a general rules/standards debate.[245] Flexible rulemaking under general policy standards permits the agency to develop policy, react to changing circumstances and address specific problems as they arise. Courts recognize the similar need to move incrementally in common law rulemaking. Why should courts require Congress to produce precise rules and standards when it does not or cannot impose that requirement on itself?[246]

Testing agency rulemaking under the principles of the delegation doctrine also appears to conflict with the policies recognized by the Supreme Court in *Chevron*. Under principles articulated in *Chevron*, agencies should make difficult policy choices, not the court.[247] Under the holding in that case, courts should defer to the agency's interpretation of its own enabling statute.[248] If the agency's interpretation does not conflict with the plain language of the statute, courts should defer to the agency.[249] The Supreme Court's holding in *Chevron* establishes a principle of deference to statutory construction by the agency. This principle is distinct from the Court's application of the constitutional nondelegation principle. However, a key policy question under both doctrines is the same: "When is deference to agency decisionmaking appropriate?"[250]

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[242] Krent, *supra* note 1, at 711.

[243] *Id.*

[244] Sunstein, *supra* note 30, at 337.

[245] Krent, *supra* note 1, at 726.

[246] *Id.* at 728.

[247] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984). *See generally* notes 189-92 and accompanying text.

[248] *Chevron*, 467 U.S. at 843-44.

[249] *Id.* at 843. It has turned out that once the agency has convinced the court that the statute is ambiguous, the agency has considerable latitude under step two of *Chevron*. *See* Schroeder & Glicksman, *supra* note 190, at 10389.

[250] Krent, *supra* note 1, at 727. Few statutes, if any, are absolutely clear. *Id.*

A final criticism of the judiciary's reinvention of the nondelegation doctrine as applied to agency rulemaking is that it ignores the fundamental principle that the power to make law is also the power to unmake law. An important justification for rejecting the nondelegation doctrine as applied to vague and broad grants of authority by Congress to administrative agencies is the fact that Congress can always amend or repeal the law. Agency rulemaking is only unchecked by Congress when it permits a regulatory policy to go forward when, in response to public and social policy considerations, it should change that policy.[251] Congress can amend or repeal the new ozone and PM rules promulgated by the EPA which provoked litigation in *American Trucking*.[252] That the petitioners successfully challenged the new EPA rules in court rather than in Congress suggests that litigation, rather than lawmaking, not only provides an opportunity for legal review, it also provides a quicker and better political avenue for attacking EPA rulemaking. If Congress wants more power and authority over agency rulemaking, it can and should take that power directly through lawmaking.[253]

CONTROLLING AGENCY DISCRETION: SOME FINAL THOUGHTS

This paper has reviewed courts' development of a new nondelegation doctrine in the last several decades and in the United States Supreme Court's rejection of the new doctrine and reaffirmation of the old delegation doctrine in *American*

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[251] Conversely, courts have long used the argument that failure by Congress to change a policy position amounts to ratification of that policy by Congress, and indication of Congressional intent. *Id.* at 735-36.

[252] Congress has taken action to change law to endorse regulatory policy adopted by an agency. For example, on September 30, 1996, the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 was signed into law. The Act limited lender environmental liability by amending sections of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 dealing with the "security interest exemption," and endorsed the EPA's "Lender Liability Rule" which had been struck down by the Eleventh Circuit Court of Appeals in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990).

[253] "Indeed, the nondelegation doctrine would emerge as a crude and unhelpful response to existing problems in modern regulation, even a form of judicial usurpation." Sunstein, *supra* note 30, at 305.

Trucking. An analysis of the cases leads one to conclude that the first goal of the nondelegation doctrine—that is, that important social policy issues should be made by Congress rather than agencies and that the courts should require agencies to limit their power to make rules under broad grants of statutory authority in order to protect democratic principles—is not achieved by courts' limiting Congress's ability to delegate rulemaking authority to agencies under the delegation doctrine. The Court's test of "intelligible principle" is so vague and undefined that it permits the broadest statutory mandates to pass. The Court's holding in *American Trucking*, that a broad statutory standard "requisite to protect public health" establishes an "intelligible principle," illustrates this point.

Courts' use of the delegation doctrine to invalidate agency rulemaking does not help achieve an appropriate balance of power among Congress, the Executive Branch, and the courts. The courts improperly intrude on the legislative and executive functions when they require Congress to walk a vaguely defined line that limits agency authority under statutes which are designed to give agencies broad discretion. The Supreme Court's decision in *American Trucking* is a positive step forward in recognizing that courts should defer to the legislature and permit the agency to exercise that discretion.[254] It may be true, as critics argue, that inherent in that broad delegation of power is a bias toward more regulation, more centralized and more complicated regulation.[255] But that is a legislative choice and one for which Congress is accountable.[256]

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[254] Oren, *supra* note 26, at 10664.

[255] Schoenbrod, *supra* note 9, at 740-41.

[256] Justice Scalia, in *Mistretta v. United States*, stated in dissent:

> Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . . [T]he limits of delegation "must be fixed according to common sense and the inherent necessities of governmental co-ordination." Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the "necessities" of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan

The second and third goals of the nondelegation doctrine—that an agency articulate an "intelligible principle" for its decision-making and that a reviewing court can test rulemaking against that standard—serve several important and valuable functions. But there are other ways a court can continue to ensure that agencies meet this requirement short of invalidating rules on the basis of constitutional theory. First, under *Chevron*, courts can continue to use techniques of statutory construction to ensure that the agency's interpretation is a "reasonable" or "permissible" one.[257] Courts can also utilize "clear statement" principles, requiring that Congress clearly articulate the principle on which the delegation is based.[258] And delegations of adjudicative power may still be invalidated on vagueness grounds.

Finally, courts should rely on § 706 of the APA as a basis for requiring agencies to clearly articulate the standard on which the agency rule is based. Under the "arbitrary and capricious" test of the APA, courts should continue to take a "hard look" at the rationale for agency rulemaking, requiring that it meet the "rational basis" test and requiring it to provide a full administrative record supporting its decision.[259] Courts can accomplish the goal of ensuring reasoned decisionmaking by

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> sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.

Mistretta v. United States, 488 U.S. at 415-16 (Scalia, J., dissenting.)

[257] Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984).

[258] Krent, *supra* note 1, at 748-49; Sunstein, *supra* note 30, at 311, 358.

[259] *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (citation omitted) ("Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Supreme Court required an inquiry whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 415-16; *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873, 875 (W.D. Tenn. 1972) (discussing, on remand, the Supreme Court's decision in *Volpe*) (citations omitted).

the agency under this traditional review for arbitrariness on a case by case basis. Congress and not the courts should have the ultimate legal and political responsibility for establishing and implementing policy through agency rulemaking.

FAMILY LAW AT THE TURN OF THE CENTURY

Deborah H. Bell[*]

Family law today bears little resemblance to the system in place fifty years ago.[1] Then, exit from marriage was carefully guarded—proof of specific, narrow fault grounds was a prerequisite for divorce. Spouses were not considered equal partners during marriage or at divorce. Financial considerations in divorce were simple—property was awarded to the spouse with title, generally the husband. An "innocent" wife was awarded alimony and custody of the children. Child support was awarded in the discretion of the chancellor. Today, divorce is almost a matter of right; complex financial issues predominate much divorce litigation; and men are increasingly awarded custody.

The advent of no-fault divorce precipitated many of the changes in family law. The upsurge in divorce was accompanied by severe economic impact on women and children. States attempted to alleviate the financial woes of female-headed households by abandoning the title system of property for a new system modeled on community property. The rising poverty rate of women and children also prompted Congressional intervention, largely federalizing child support laws. At the same time the women's movement and changing constitutional notions of gender equality ended legal preferences for mothers in custody decisions and made alimony equally available to husbands. Consequently, the major areas of family law—divorce grounds, property division, alimony, custody, and

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[*] B.A., Mississippi College, J.D., University of Mississippi, Law Clerk to Judge Elbert P. Tuttle, Sr., United States Court of Appeals for the Fifth Circuit, Staff Attorney, Atlanta Legal Aid Society, Professor of Law, University of Mississippi, Mississippi Defense Lawyer's Association Distinguished Lecturer, Director, Poverty Law Clinic.

[1] *See* JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW ¶ 8.01, at 224 (2d ed. 2001).

child support—have been completely transformed in fifty years.

I. GROUNDS FOR DIVORCE: FROM LIMITED FAULT TO NO-FAULT DIVORCE

Today, divorce is almost as common as marriage. Most laymen can recite that one in two marriages ends in divorce.[2] But in 1950, divorce was not an option for many unhappily married couples. Marriage dissolution was allowed only on narrow statutory grounds. In the 1970s, the legal system responded to an overwhelming demand for reform, instituting the era of no-fault divorce. In most states, divorce is now available to one spouse who wants to end the marriage.

A. The Fault-based System of Divorce

The history of divorce in English and American law is inextricably linked to the church. Marriage in medieval England was considered a sacrament that could not be dissolved by divorce.[3] Annulment was available only in very limited circumstances.[4] If specific fault grounds were met, a spouse could secure a legal separation, or "divorce from bed and board," but could not remarry.[5] England remained a "divorceless" society until 1857.[6] In the American states, divorce laws varied significantly from state to state through the nineteenth century.[7] Southern states were more likely to ban divorce except by private legislative bill, while northern states were more likely to authorize fault-based divorce.[8] By the late

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[2] *Id.* § 8.01[C], at 224. The authors note that more than a million divorces are granted each year, and that the average duration of marriage is seven years. *Id.*

[3] *Id.* § 8.01[A] at 221.

[4] *Id.* Annulments were permitted based on specific marital impediments. *Id.*

[5] *Id.* § 8.01[A], at 222.

[6] IRA MARK ELLMAN ET AL., FAMILY LAW 187 (1998) (citing FREIDMAN, A HISTORY OF AMERICAN LAW 204-207, 498-504 (2d ed. 1985) (noting that very wealthy could occasionally obtain legislative bill of divorce, but average between 1800 and 1836 was three per year)).

[7] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 12.1, at 408 (2d ed. 1988).

[8] ELLMAN, ET AL., *supra* note 6, at 188.

1800s, demand for divorce based on fault prevailed, and most states provided for judicial dissolution of marriages based on statutory grounds for divorce.[9]

The fault-based system of divorce remained largely unchanged until the latter half of the twentieth century.[10] Divorce required proof by one spouse that the other was "at fault."[11] Courts were prohibited from awarding default judgments in divorce actions, requiring strict proof that the complainant was entitled to divorce under one of the statutory grounds.[12] In Mississippi, the most commonly used grounds for divorce were adultery,[13] desertion, and habitual cruel and inhuman treatment.[14] Divorce based on desertion required proof of continued, intentional desertion for at least one year.[15] To obtain a divorce based on cruelty, a spouse had to

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[9] CLARK, *supra* note 7, § 12.1, at 408-409.

[10] ELLMAN, ET AL., *supra* note 6, at 191.

[11] ELLMAN, ET AL., *supra* note 6, at 190-191.

[12] *See* CLARK, *supra* note 7, § 14.4, at 539; *see also* Ladner v. Ladner, 102 So. 2d 195 (Miss. 1958).

[13] Adultery is "voluntary sexual intercourse of a *married* person with a person other than the offender's spouse." Owen v. Gerity, 422 So. 2d 284, 287 (Miss. 1982). Adultery may be shown by circumstantial proof, either by proving "an infatuation for a particular person of the opposite sex or a generally adulterous nature," combined with "evidence of a reasonable opportunity to satisfy the infatuation or proclivity." McAdory v. McAdory, 608 So. 2d 695, 700 (Miss. 1992) (citing *Owen*, 422 So. 2d at 287). The party seeking divorce must show both elements by clear and convincing evidence. Brooks v. Brooks, 652 So. 2d 1113, 1116 (Miss. 1995). Because of the illicit nature of adulterous conduct, direct evidence is not required, but proof by circumstantial evidence must be logical and inconsistent with a theory of innocence. Dillon v. Dillon, 498 So. 2d 328, 330 (Miss. 1986).

[14] See MISS. CODE ANN. § 93-5-1 (1994 & Supp. 2001) for the current version of the statute. Other divorce grounds include: habitual drunkenness, habitual drug use, incurable insanity, insanity at the time of the marriage, impotency, imprisonment, pregnancy of the wife at the time of the marriage by one other than the husband, bigamy, and relationship within the prohibited degrees of kinship. *Id.*

[15] *Id.* § 93-5-1. Mississippi recognizes constructive desertion (where one spouse engages in conduct that forces the other to leave the marital home) as a ground for divorce where (1) conduct of the spouse reasonably renders continuance of the marital relationship unendurable, or (2) where continuation of the marriage is dangerous to life, health, or safety. *See* Day v. Day, 501 So. 2d 353, 356 (Miss. 1987) (finding that wife had not constructively deserted husband while living apart under separate maintenance decree); Benson v. Benson, 608 So. 2d 709, 710 (Miss. 1992) (stating that court should decide if spouse's behavior is so extreme as to make marriage unendurable when considering request for divorce on con-

prove conduct "so unkind, unfeeling or brutal as to endanger, or put one in reasonable apprehension of danger to life, limb or health, and . . . habitual, that is, done so often. . . that it may reasonably be said a permanent condition . . . or so unnatural and infamous as to make the marriage revolting to the offending spouse and render it impossible for that spouse to discharge the duties of the marriage."[16] Common law defenses to divorce created additional impediments to ending a marriage. A spouse who continued to live with the other after learning of adultery "condoned" the adultery and could not obtain a divorce.[17] In probably the most absurd rule of divorce law, a court was prohibited from granting a divorce if both parties proved grounds for divorce. Because divorce required an innocent spouse, the doctrine of recrimination would not allow divorce when both parties were guilty of misconduct.[18]

B. Divorce Reform

By mid-twentieth century, a nationwide reform movement demanded overhaul of divorce laws. The strict limitations on divorce prompted much criticized collusion between spouses and attorneys to fabricate divorce grounds. In fact, the problem of collusive divorce was so widespread that many states enacted statutes specifically prohibiting collusion in divorce

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structive desertion grounds). Griffin v. Griffin, 42 So. 2d 720, 722 (Miss. 1949) (finding constructive desertion was found where a husband, without cause, refused to work, leaving his family destitute, without food and dependent on neighbors).

[16] Bullock v. Bullock, 95-CA-00636-SCT, ¶ 16, 699 So. 2d 1205, 1209 (Miss. 1997) (citing Daigle v. Daigle, 626 So. 2d 140, 144 (Miss. 1993) and Wilson v. Wilson, 547 So. 2d 803, 805 (Miss. 1989)).

[17] Stribling v. Stribling, 215 So. 2d 869, 870 (Miss. 1968); Thames v. Thames, 100 So. 2d 868, 870 (Miss. 1958) (resuming of cohabitation, standing alone, condones the marital offense).

[18] MISS CODE ANN. § 93-5-3 (1994) now provides that it is not mandatory that a Chancellor deny a divorce, even though the evidence may establish recrimination. The statute was interpreted in *Parker v. Parker*, 519 So. 2d 1232, 1235-36 (Miss. 1988). If both parties are seeking a divorce and both prove grounds, then the court must grant the divorce to the party who is most innocent. *Id.*; *see* Hinton v. Hinton, 179 So. 2d 846, 848 (Miss. 1965) (finding that both parties cannot be both innocent and guilty of cruel and inhuman treatment); Hyer v. Hyer, 636 So. 2d 381, 383 (Miss. 1994) (citing *Hinton*).

actions.[19] While some spouses perjured themselves to obtain divorces, others opted for migratory divorce, traveling to jurisdictions with short residency requirements to obtain a divorce.[20] State courts responded to the gap between social reality and divorce law—divorces based on "cruelty" were often granted on evidence that simply showed incompatibility.[21] Professor Clark noted in 1968:

> Cruelty . . . has proven to be capable of nearly limitless expansion, in the face of pronouncements by appellate courts which would lead one to think that the definition of cruelty had not changed much for one hundred and fifty years. In many states, . . . a divorce for cruelty may be had for the asking, provided it is uncontested.[22]

The Mississippi courts were no exception. Cases from the 1960s and 1970s show the courts increasingly granting divorce based on habitual, cruel and inhuman treatment. Although the courts continued to articulate the traditional test for cruelty[23] divorces were often granted on grounds much closer to modern irretrievable breakdown. For example, in *Wires v. Wires,*[24] a husband was granted a divorce because his wife was jealous, accused him of philandering, would not let his daughter-in-law visit, and bickered so much with his son he left home.[25] While the court noted that cruelty means more than unkindness or rudeness or mere incompatibility, it held that "habitual ill-founded accusations, threats, and malicious sarcasm, insults and verbal abuse may cause such mental suffering as to de-

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[19] *See* Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV., 1121-33 (1936) (noting scarcity of cases discussing collusion, but general agreement among legislators, judges, clerks, attorneys and litigants that collusion was pervasive). *See* MISS. CODE ANN. § 93-5-7 (1994 & Supp. 2001) (requiring that divorcing spouses sign affidavit of no collusion).

[20] CLARK, *supra* note 7, § 12.1, at 409-410 (Alabama at one time had a one-day residency requirement).

[21] ELLMAN, ET AL., *supra* note 6, at 193-94.

[22] ELLMAN, ET AL., *supra* note 6, at 193-94 (quoting HOMER H. CLARK, JR., LAW OF DOMESTIC RELATIONS 341 (1968)).

[23] *See supra* note 13 and accompanying text.

[24] 297 So. 2d 900 (Miss. 1974).

[25] *Wires*, 297 So. 2d at 901.

stroy health."[26] Although noting that this was a close case, the court found sufficient evidence of cruelty.[27]

As noted by the National Conference of Commissioners on Uniform State Laws, there was "virtual unanimity as to the urgent need for basic reform" of the fault-based system.[28] The California Governor's Commission on the Family explained the need for a new system:

> commission of a matrimonial offense constitutes guilt in a formalistic sense only; guilt in the true sense almost always lies with both parties; . . . the necessity of alleging a matrimonial offense creates an atmosphere of hostility in which it is difficult to settle the issues of child custody and support, or property settlement and alimony; the commission of an offense can be feigned so that insincerity and perjury may be induced to the detriment of the respect for the law and the courts.[29]

In 1969 California became the first state to enact no-fault legislation, starting a trend that quickly swept the nation.[30] On the heels of the California act, the Commissioners on Uniform State Laws produced the Uniform Marriage and Divorce Act, which provided for divorce upon a finding that a marriage was "irretrievably broken."[31] By 1985, every state in the country had enacted some form of no-fault or irreconcilable differences divorce.[32]

C. Irreconcilable Differences Divorce in Mississippi

In 1976, the Mississippi Legislature joined the divorce reform movement, enacting an irreconcilable differences divorce statute.[33] The Act initially allowed no-fault divorce if both

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[26] *Id.* at 902.

[27] *Id.* at 902. In that case, the court changed the standard of proof from clear and convincing evidence to a preponderance of the evidence. *Id.*

[28] GREGORY ET AL., *supra* note 1, § 8.01[B], at 223-24.

[29] ELLMAN, ET AL., *supra* note 6, at 198-99.

[30] GREGORY, ET AL., *supra* note 1, § 8.01[B], at 223-224.

[31] CLARK, *supra* note 7, § 12.1, at 410-11.

[32] GREGORY, ET AL., *supra* note 1, § 8.01[B], at 224.

[33] *See* MISS. CODE ANN. § 93-5-2 (1994 & Supp. 2001).

spouses agreed to be divorced and agreed on custody, property division and support issues. The statute was later amended to allow parties who agree to irreconcilable differences divorce to submit the remaining issues to the chancellor for decision. The petition for irreconcilable differences divorce must be filed for sixty days before a divorce may be granted.[34]

Most no-fault statutes permit divorce if one spouse proves that the marriage is irretrievably broken. According to Professor Ira Ellman, in practice the effect is to permit unilateral divorce.[35] In contrast, the Mississippi no-fault statute does not allow one spouse to obtain a divorce by proving irreconcilable differences. Instead, both spouses must agree to a divorce without assigning fault.[36] If both do not agree, divorce is still available only upon proof of one of the traditional twelve fault grounds. Thus, Mississippi is one of the few states remaining in the country that does not permit true, unilateral no-fault divorce.[37]

Prior to passage of the irreconcilable differences statute, Mississippi courts granted divorces based on cruelty when the evidence showed only extreme incompatibility. After 1976, the court announced a return to a more stringent standard for assessing habitual, cruel, and inhuman treatment. In *Marble v. Marble*,[38] the court stated that the cruelty required for divorce is "not such as merely to render the marriage undesirable or unpleasant, but . . . impossible, except at the risk of life, limb, or health."[39] Accordingly, the court denied a divorce to the husband even though it noted that "[t]he parties are not compatible . . . [the husband] appears genuinely unhappy" and "it is evident John and Rebecca can no longer live together."[40]

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[34] *Id.*

[35] *See* ELLMAN, ET AL., *supra* note 6, at 206 (discussing studies in California, Nebraska and Iowa; Nebraska survey of 10,000 divorce cases failed to show a single case where divorce was denied when one spouse desired divorce).

[36] *See* MISS. CODE ANN. § 93-5-2.

[37] *See* ELLMAN, ET AL., *supra* note 6, at 216.

[38] 457 So. 2d 1342 (Miss. 1984).

[39] *Marble*, 467 So. 2d at 1343 (quoting Howard v. Howard, 138 So. 2d 292, 293 (1962)).

[40] *Id.* at 1342-43.

Since *Marble*, the court has followed the strict traditional test for cruelty.[41] In *Mitchell v. Mitchell*,[42] the court denied a divorce even though the couple argued bitterly and the husband suffered depression as a result. Divorce was denied, even though "the parties are incompatible, and the marriage is not reconcilable."[43] In another case the court noted that the couple

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[41] Since 1984, divorces have been denied even where the marriage appeared irretrievably broken. *See* Wilson v. Wilson, 547 So. 2d 803, 804 (Miss. 1989) (denying divorce where court noted that couple genuinely hated each other); Kergosien v. Kergosien, 471 So. 2d 1206, 1208 (Miss. 1985) (denying divorce where proof showed that the wife often disappeared and could not be found, locked husband out of the house, told child she hated him, slapped another child and complained to children that she had to take care of them); Gallaspy v. Gallaspy, 459 So. 2d 283, 283 (Miss. 1984) (denying divorce where husband criticized wife for being overweight, put his first priority on work, criticized her family and did not support or praise the children enough).

The Mississippi cases where divorces were granted on the basis of cruelty show that extreme circumstances are required. *See* Sproles v. Sproles, 1999-CA-01502-SCT, ¶ 7, 782 So. 2d 742, 745 (Miss. 2001) (husband drank a case of beer a night, was abusive, threatened wife's life; treated her in dehumanizing ways); Holladay v. Holladay, 1999-CA-00291-SCT, ¶¶ 4-13, 776 So. 2d 662, 665-66 (Miss. 2000) (husband locked his wife out of the home and away from her frightened young daughter for an entire night, closed her checking account and took her checkbook away from her; violence required two police interventions; wife sought counseling for abuse); Robison v. Robison, 97-CA-00889-SCT, ¶ 6, 722 So. 2d 601, 603 (Miss. 1998) (husband restricted his wife's social life, told her she was undesirable, discussed sexual relations with other women, rarely had sex with her, threw her off the bed the last three times he did have sex with her, neglected the family financially so that friends held a food drive for them; abuse resulted in wife's treatment for depression); Labella v. Labella, 97-CA-00764-SCT, ¶ 3, 722 So. 2d 472, 473 (Miss. 1998) (ten incidents of physical violence during the course of a ten year marriage); Keller v. Keller, 1999-CA-00874-COA, ¶¶ 32-34, 763 So. 2d 902, 908-09 (Miss. Ct. App. 2000) (husband engaged in at least one act of physical violence, refused to have sexual relations for the last year of the marriage, beat his wife's fourteen year old son from a first marriage, demanded that she "get rid" of the child by giving up custody of him; both mother and son sought psychiatric treatment as a result of the abuse); Moore v. Moore, 1998-CA-01437-COA, ¶¶ 17-19, 26-27, 757 So. 2d 1043, 1047, 1049 (Miss. Ct. App. 2000) (emotional and verbal abuse, four instances of physical abuse, and resulting depression requiring medication).

[42] 1999-CA-01701-COA, 767 So. 2d 1037 (Miss. Ct. App. 2000).

[43] *Mitchell*, 767 So. 2d at 1043; *see also Kergosien*, 471 So. 2d at 1208 (denying divorce to a husband who proved that the wife often disappeared and could not be found, locked him out of the house, told their child she hated him, slapped another child, threw the children's toys out in the yard, and complained to the children that she had to take care of them).

genuinely hated each other and could not agree on the day of the week.[44]

Divorce reform in Mississippi stops short of unilateral divorce. Appellate courts' decisions show that a number of divorces still proceed on fault-based grounds, and a significant number are denied.[45] On the other hand, the day is gone when a couple was doomed to remain, against both their wishes, in a marriage that could not be mended.

II. PROPERTY DIVISION: FROM TITLE SYSTEM TO EQUITABLE DISTRIBUTION

The boom in divorces and the resulting financial impact on women and children prompted nationwide reform of marital property law. In one of the most significant family law developments of this period, common law states abolished the method historically used to divide property between divorcing couples. The new system—equitable distribution—is based on a concept of marriage diametrically opposed to the theory underlying the old title system. Divisions of property under the new system bear little resemblance to those under the title system.

A. The Title System

Until the last half-century, courts divided property between divorcing spouses under either of two very different marital property systems.[46] Prior to 1970, the title system in effect in

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[44] *Wilson*, 547 So. 2d at 804-05.

[45] *See* Talbert v. Talbert, 759 So. 2d 1105, 1109 (Miss. 1999) (no divorce where husband belittled his wife, screamed at her, and committed a few acts of violence early in the twenty-seven year marriage); Wilbourne v. Wilbourne, 748 So. 2d 184 (Miss. 1999) (denying divorce although marriage "was unpleasant and the parties were incompatible" and arguments "on occasion involved physical violence"); *Mitchell*, 767 So. 2d at 1043 (couple argued, the husband "seemed more depressed" after than before his marriage; the marriage might be irreconcilable, the parties incompatible, and the wife argumentative, but those facts do not amount to proof of cruelty); Ayers v. Ayers, 97-CA-01148-COA, ¶¶ 6-7, 734 So. 2d 213, 214-15 (Miss. Ct. App. 1999) (no divorce where husband rarely talked to his wife or requested sex, she was uncomfortable in his church, she was "sensitive and prone to tears").

[46] J. THOMAS OLDHAM, DIVORCE, SEPARATION, & THE DISTRIBUTION OF PROPERTY §§ 2.02[10], 3.01, at 3-2 (2001). *See generally*, Harriet S. Daggett, *Division of*

Mississippi and most states required that courts award property to the spouse who held title to the property during the marriage.[47] This title system viewed marriage as a union of economically separate individuals, with each acquiring property for themselves, and not for the marital unit.[48] It was only after passage of the Married Women's Property Acts that women were even permitted to hold title to real property.[49] These Acts, however, only affected a woman's right to her separate property, acquired by gift or by her own efforts and titled in her name. The Acts did not create any property right in assets titled in her husband's name.[50]

The strict rule against title transfer applied even if the wife was a wage-earner or worked in the husband's business. If the wife's salary went to disposable purchases while the husband's income was used to acquire assets, the title system awarded the assets to the husband nonetheless.[51] Not surprisingly, under this system the husband, as the primary wage-

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Property Upon Dissolution of Marriage, 6 LAW & CONTEMP. PROB. 225 (1939).

[47] BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 1.02, at 4 (2d ed. 1994); LESLIE HARRIS ET AL., FAMILY LAW 329 (Little, Brown & Co. 1996).

[48] HARRIS ET AL., *supra* note 47, at 8. The authors caution that this description is overly simplistic, and that the title system was never as inflexible as current discussion indicates. *Id.* at 316.

[49] *Id.* at 12-13.

[50] The American title system grew out of the English common law of the eighteenth century, which viewed marriage as a merger of the husband and wife, with the husband holding legal title to all property of the marriage, including the wife's previously owned property. Under this system, no property division occurred upon divorce, since all property was owned by the husband. Subsequently, American states enacted women's property acts recognizing married women as persons under the law, with the right to hold title to property. Courts continued to apply the title system, but after the enactment of women's property acts, the system allowed married women to retain any property titled in their name, while their husbands retained property titled in theirs. TURNER, *supra* note 47, § 1.02, at 3.

[51] *See* Hinton v. Hinton, 179 So. 2d 846 (Miss. 1965). In *Hinton*, the wife requested an interest in farm property titled in the husband's name. *Hinton*, 179 So. 2d at 848. Evidence showed that she had worked on the farm "as any other industrious farm wife would do" and had worked as a nurse and contributed her earnings to family expenses. *Id.* The court held that she was not entitled to an interest in the farm property. *Id.*; *see also* Murdoch v. Murdoch, 13 REP. FAM. L. 185 (Supreme Court of Canada 1974) (wife not entitled to share of ranch titled in husband's name even though she worked on ranch, including having primary responsibility during almost half of year), reprinted in HARRIS ET AL., *supra* note 47, at 14.

earner and title holder, usually left the marriage with most of the property.[52] If, as was generally the case, the title system left a wife without sufficient property or earning potential to support herself after divorce, courts awarded her permanent alimony.[53]

In contrast to the title system, the system of community property views marriage very differently.[54] Rather than viewing a married couple as distinct individuals acquiring property for their own benefit, the community property system acknowledges a married couple as an economic unit. Under this system, derived from Spanish law, all income earned by either spouse or property purchased with those earnings is marital property. Regardless of how title is held, each spouse owns one-half of all marital property.[55] Property acquired through gift or inheritance, or owned prior to the marriage, is the separate property of the individual owning spouse.[56] Thus, spouses equally own whatever their efforts during marriage produce, but keep separate ownership of property that does not result from their efforts.

B. Property Division Reform

By the middle of the twentieth century, critics attacked the title system as unfair to traditional homemakers.[57] They argued that the homemaker's valuable contribution to the marital unit was completely ignored by a system that awarded all prop-

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[52] Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 695 n.47 (1990); A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Proposed Final Draft Part I, Feb. 14, 1997, at 1.

[53] OLDHAM, *supra* note 46, § 3.02[1], at 3-3.

[54] Eight states follow a community property regime. *See* A.L.I., *supra* note 52, at 2.

[55] TURNER, *supra* note 47, § 1.02, at 5.

[56] William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 FAM. L.Q., 154, 163-64 (1989).

[57] OLDHAM, *supra* note 46, § 3.02[2], at 3-4.

erty to the wage-earner.[58] The Mississippi Supreme Court voiced its criticism of the system in *Hemsley v. Hemsley*:[59]

> Most parties enter into marriage with no estate and proceed to build an estate together. . . . If the breadwinner happens to be the husband and has all property in his name, this serves to relegate the non-breadwinner wife to the equivalent of a maid—and upon division of the marital estate entitled to a minimum wage credit for her homemaking service.[60]

Furthermore, critics dismissed alimony as an ineffective means of support. There was no guarantee of collection. Support was not available to a wife "at fault." Even if alimony was awarded, it was lost when the wife remarried. Furthermore, alimony was paid because the homemaker was deemed in need and not because she was seen as a contributing partner in the marriage.[61] Consequently, there seems to have been fairly wide agreement that the title system worked to the traditional wife's disadvantage.[62]

In response to these concerns, legislatures began to chip away at the title system, passing statutes that allowed divorce courts to award a wife assets to which she had made direct contributions. At the same time, courts in some states developed judicial remedies to accomplish substantially the same result. By the mid-1960's, a substantial number of states permitted distribution of assets between spouses without regard to title. However, these statutes were generally very discretionary, and still retained the notion that the property "belonged" to the husband. As a result, "the wife's property rights were clearly secondary to those of the husband."[63]

Following the no-fault divorce revolution, the trend toward discretionary property division turned into a wholesale overhaul of marital property law. Brett Turner, one of the leading

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[58] *See* Susan Westerberg Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 2-5 (1977).

[59] 639 So. 2d 909 (Miss. 1994).

[60] *Hemsley*, 639 So. 2d at 915.

[61] *See* alimony section *infra* text pp. 18-25.

[62] OLDHAM, *supra* note 46, § 3.02[2], at 3-4.

[63] *Id.* at 8.

authorities on equitable distribution, suggests that the rising divorce rate of the 1960's accelerated the demise of title systems because the greater number of divorce cases made the system's flaws more noticeable. In addition, the loss of fault as a bargaining tool for wives in many states affected their ability to gain property division concessions not legally mandated. Finally, and most importantly, the changing role of women in society, with the expectation that women would be able to support themselves, undermined alimony as a marital dissolution equalizer and led to property division as an alternative.[64] These changes, combined with the existing perception that the title system disadvantaged homemakers, provided the catalyst for replacement of the title system.

C. Adoption of Equitable Distribution

The solution of the common law states was to develop a third marital property system, a hybrid between the title system and community property. Equitable distribution is based upon the marital partnership theory adopted from community property law.[65] The marital partnership theory views marriage as a partnership in which both spouses contribute, financially or otherwise, to the growth of the partnership and the accumulation of assets.[66] Professor Joan Krauskopf identifies three assumptions underlying the theory. First, the theory is based on an assumption that "when two persons marry they make a commitment to the marital unit. . . . Each person will contribute all time and effort to the family welfare and will share the results of their commitment—good and bad, monetary and nonmonetary."[67] Second, the theory recognizes that homemaking enables the wage-earner to produce. Third, because homemaking enables earning, its value is proportional to the income

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[64] TURNER, *supra* note 47, at 10 n.38.

[65] Robert Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 148 (1989).

[66] TURNER, *supra* note 47, at 16. Marital partnership theory "is mentioned in almost every case today." *Id.*

[67] Jean M. Krauskopf, *Classifying Marital and Separate Property — Combinations and Increase in Value of Separate Property*, 89 W. VA. L. REV. 997, 997-98 (1987).

produced.[68] Accordingly, the assets produced by the efforts of either spouse belong to the partnership, and each spouse has a right to a fair share of the partnership's assets. Equitable distribution did not sweep the country overnight. Instead, the transformation of marital property law occurred as a result of years of tentative changes, followed by a brief period of rapid and comprehensive changes. Today, no state uses the title system for property division at divorce.[69]

Equitable distribution states have adopted different approaches for determining which assets are included in the divisible marital estate.[70] However, a majority of states use a dual classification system similar to that used in community property systems.[71] These states distinguish between marital property which is produced through efforts of the marital partnership, and separate property which is unrelated to marital partnership efforts. In most dual classification states, although marital property may be divided between the spouses without regard to title, separate property belongs to the owning spouse alone.[72] This approach is consistent with the theory of marital

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[68] *Id.*

[69] The initial catalyst for the rapid changes was the Uniform Marriage and Divorce Act, which proposed two alternative marital property regimes—a community property system and an all property equitable distribution system. UNIF. MARRIAGE AND DIVORCE ACT § 307 (amended 1973), 9A U.L.A. 238-39 (1987). The UMDA was not widely adopted, but it sparked a national debate that resulted in the passage of equitable distribution statutes in almost all states. TURNER, *supra* note 47, § 1.02, at 14.

[70] A minority of states follow an all property (or "kitchen sink" or "hotchpot") equitable distribution system, in which courts may divide all property owned by either spouse. Reppy, *supra* note 56, at 166. Professor Levy notes that this system, also called a "hotchpot" system, has the advantage of reducing costly and time-consuming litigation, but does not necessarily comport with the expectations of divorcing spouses. *See* Levy, *supra* note 65, at 156 and n.42. A table listing all property equitable distribution states is set out in Joseph A. McKnight, *Defining Property Subject to Division at Divorce*, 23 FAM. L.Q. 193, 196 (1989).

[71] TURNER, *supra* note 47, at 44. Turner points out that the differences between the two systems are not as stark as often portrayed. Even in all property states, most courts divide separate property unequally. The result, therefore, is that the real difference is not between division of separate property and no division, but between unequal division of separate property and no division. *Id.*

[72] McKnight, *supra* note 70, at 193-94. McKnight also points out that a few states have created a hybrid system in which only marital property is subject to division unless special equities exists which require a division of separate estates.

partnership. Professor Levy suggests that separate property exceptions reflect "essentially common-sense extrapolations of fairness notions and beliefs about spouses' expectations."[73] He believes that couples commonly perceive that income of either of them during the marriage is shared marital property, while assets owned prior to marriage, inherited or received as a gift are separate.[74]

D. Equitable Distribution in Mississippi

The process of moving from the title system to equitable distribution in Mississippi fits the national pattern. Over the last twenty years, a series of decisions by the supreme court substantially eroded the title system.[75] As in other states, though, the transition was tentative and created a discretionary equitable remedy rather than a legal right. Finally in 1994, Mississippi became the last of the title states to adopt equitable distribution in *Ferguson v. Ferguson*.[76]

The Fergusons' circumstances were typical of cases that prompted development of equitable distribution across the country. Linda, forty-four years old, and Billy, forty-eight years old, separated and filed for divorce in May of 1991, after twenty-four years of marriage.[77] Their children, Tamatha and Bubba, were twenty-three and fourteen.[78] Linda worked as a homemaker and cosmetologist, with a monthly salary of approximately $820.00. Billy was employed by Bell South, where he earned $3,000.00 a month. Billy held title to farm equip-

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Id. at 195.

[73] Levy, *supra* note 65, at 152.

[74] *Id.*

[75] *See* Thomas W. Crockett & Walter P. Neeley, *Mississippi's New Equitable Distribution Rules: The Ferguson Guidelines and Valuation*, 15 MISS. C. L. REV. 415, 416 (1995) (including good discussion of decisions marking shift from title system to equitable distribution).

[76] 639 So. 2d 921, 926 (Miss. 1994).

[77] *Ferguson*, 639 So. 2d at 929.

[78] *Id.* at 929. The Fergusons also litigated custody of Bubba. Billy sought custody based upon Bubba's expressed desire to live with him. *Id.* Linda alleged that Billy let Bubba chew tobacco, ride a four-wheeler alone, carry a .357 magnum pistol, and promised him a truck. *Id.* at 932. The court upheld the chancellor's award of custody to Linda. *Id.*

ment, a partial interest in a cattle business, a partial interest in a mobile home park, and a leasehold interest in a farming operation. In connection with his employment, he also held title to a savings plan, a stock ownership plan, and a vested pension. The couple jointly owned the marital home and thirty-three acres of land. Other than the jointly owned property, Linda's only asset was a 1988 Oldsmobile.[79] Linda asked for one-half of the listed property. Billy took the position that she was not entitled to any property titled in his name.[80]

Under the title system, a chancellor hearing Linda and Billy Ferguson's divorce would apply a fairly simple process of property division. Linda would get the Oldsmobile, one-half the value of the marital home and one-half of the thirty-three acres. Everything else would go to Billy. Even though Linda worked as a homemaker without compensation and earned income used to support the family, she would leave the marriage with a small share of assets compared to Billy's estate. To supplement her income of $850.00 a month, the court would award her alimony.[81]

The Mississippi Supreme Court announced the new system in the opening lines of the opinion: "This Court has been in a transitory state regarding the division of marital assets. . . . With this opinion, this Court adopts guidelines for application of the equitable distribution method of division of marital assets."[82] The court proceeded to discuss the potential unfairness of the title system, noting that in traditional households, the system failed to account for the non-financial contribution of housewives and, therefore, resulted in an unjust division.[83] The court justified judicial announcement of the change by reference to the chancery court's statutory authority to "make

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[79] *Id.* at 936. According to testimony of Billy's "paramour," Billy removed $30,000 from his savings plan and placed the money where it could not be found. *Id.* at 933.

[80] *Id.* at 933-34.

[81] Linda was the "innocent" party, since the chancellor held that Billy was at fault in the marriage, awarding Linda a divorce on the ground of adultery. *Id.* at 929-30.

[82] *Id.* at 925.

[83] *Id.* at 926.

all orders touching the care, custody and maintenance of the children" and "touching the maintenance and alimony of the wife or husband or any allowance to be made to her or him."[84]

Sensing that the decision would be attacked as an adoption of community property rules, the court emphasized that it did not intend to create a community property regime. "[N]o right to property vests by virtue of the marriage relationship alone prior to entry of a judgment or decree granting equitable or other distribution. . . . Thus the rights of alienation and the laws of descent and distribution are not affected by our recognition of marital assets."[85] With regard to the assets available for distribution, the court adopted the majority dual classification system, distinguishing marital and separate property.[86] The court did not establish a presumption or starting point governing division. Instead, it emphasized that there is no right to an equal division, the proper distribution being within the chancellor's discretion.[87]

The court enumerated eight factors to be considered by a chancellor making an equitable distribution of property: (1) substantial contribution to property accumulation, including direct or indirect economic contribution, contribution to marital and family stability, and contribution to the education or training of the wage-earning spouse; (2) spousal use or disposition of assets and distribution by agreement; (3) market and emotional value of assets; (4) value of each spouse's separate estate; (5) tax consequences and legal consequences to third parties; (6) extent to which property division can eliminate the need for alimony; (7) needs of each spouse; (8) other factors which should be considered in equity.[88] In addition, the court specifi-

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[84] *Id.* at 927 (quoting MISS. CODE ANN. § 93-5-23 (Supp. 1993)).

[85] *Id.* at 928.

[86] *Id.* For a definition of marital assets, the court referred to its decision in *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994), decided the same day as *Ferguson*. In *Hemsley*, the court defined marital property as "any and all property acquired or accumulated during the marriage." *Hemsley*, 639 So. 2d at 915.

[87] *Ferguson*, 639 So. 2d at 927.

[88] *Id.* at 928.

cally noted that it would require findings of fact by chancellors applying the eight factors governing division.[89]

The court in *Ferguson* outlined the steps to be followed when making an equitable distribution of property: A chancellor is to (1) classify assets as marital or separate; (2) value assets using expert testimony if necessary; (3) divide marital property equitably, based on factors set out in the decision; and (4) award alimony if needed.[90] In *Hemsley v. Hemsley*, decided the same day, the court also adopted a presumption that property acquired during marriage is marital property, thereby, placing the burden of proof on the spouse claiming a separate property interest in a particular asset.[91]

Equitable distribution undeniably remedied serious inequities in marital property division. The new system comes much closer than the title method to recognizing expectations about property ownership in marriage and should significantly increase predictability in property division. At the same time, its adoption introduced a new complexity into divorce litigation. The title system, with its inherent flaws, did offer one advantage: while cases might be factually complex, the governing legal principles were relatively simple. In contrast, complexity has been the hallmark of equitable distribution law in all states. Spouses have clashed over timing issues such as whether an asset was acquired "during the marriage," whether joint gifts and interspousal gifts are separate property, and how to deal with income from or appreciation of separate property. Certain types of assets, such as professional degrees and goodwill, result in extensive litigation over whether they are "property" even capable of division. Since property exchanged for separate property gets separate classification, lawyers have generated complex tracing rules to isolate separate property from marital property. In fact, the closely related issue of transmutation of separate property into marital is perhaps the most difficult and least understood classification issue. Conse-

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[89] *Id.* at 929.
[90] *Id.*
[91] *Hemsley*, 639 So. 2d at 914.

quently, these issues can be time-consuming and costly to litigate.[92]

III. ALIMONY: IN TRANSITION

More than any other area of family law, alimony is in a state of transition and uncertainty. The historical basis for alimony has been seriously undermined. And, although many cases clearly warrant some spousal support, no satisfactory system for awarding support has emerged. Reflecting this uncertainty, in the last five years, Mississippi courts have created two new forms of alimony, abandoned traditional dividing lines between types of alimony, and endorsed a more contractual, less regulated approach to alimony.

A. Traditional Alimony

Historically, alimony was based on a husband's duty to provide lifetime support for a faithful and innocent wife. Under the common law title system, even a "deserving" wife could not be awarded property titled in her husband's name; alimony was the remedy for a divorced woman without adequate income. Alimony was awarded on the basis of need, without the benefit of a formula for determining the proper amount or any real explanation of the theoretical basis for the award.[93]

Awards of alimony were closely related to fault-based notions of divorce. Some courts apparently viewed alimony as a

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[92] For a complete discussion of these issues, see Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 Miss. L.J. 115 (1997).

[93] *See* A.L.I., *supra* note 52, at 5-6

> Some opinions find an alimony claimant in "need" only if unable to provide for her basic necessities; others find need if the claimant is unable to support himself at a moderate middle-class level; and still others find need when the claimant is unable to sustain the living standard enjoyed during the marriage even if it was lavish.

Id. The Institute proposes that alimony be re-characterized as compensation for loss, using the term "compensatory payment" rather than alimony or spousal support. ALI, *supra* note 52, § 5.01-5.05. *See also* Jean M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 262 (1989).

punishment meted out to an errant husband for leaving the marriage,[94] while no alimony was awarded to a wife who was at fault.[95] Fifty years ago, the Mississippi Supreme Court held that when divorce is based on the wife's adultery, she is not entitled either to alimony or to the custody of the children.[96] In addition, alimony could be terminated or reduced based on a wife's "adulterous" behavior after divorce.[97] As late as 1980, the Mississippi court upheld a chancellor's termination of alimony based on the wife's "adultery" with four men in the six years following divorce:

> appellant had forfeited her right to future support from appellee because her admitted adultery during the period following her divorce was of sufficient duration and frequency to justify the holding of the chancellor. To hold otherwise would be to condone adultery and in effect would penalize a divorcee for marrying but reward her for cohabitation without benefit of marriage.[98]

Alimony traditionally took one of two forms: permanent, periodic alimony payable on a monthly basis or lump-sum alimony, payable in a set amount. Periodic or traditional alimony was intended to replace the husband's duty to provide support at the standard of living of the marriage. Accordingly, periodic alimony is typically paid by the month, with no set ending date, and can be modified based upon a change in circumstances since the original divorce decree.[99] Periodic alimony termi-

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[94] OLDHAM, *supra* note 46 § 3.02[1] at 3-3 to 3-5.

[95] In *Winfield v. Winfield*, 35 So. 2d 443, 444 (Miss. 1948), the Mississippi Supreme Court held that when divorce has been properly granted because of the adultery of the wife, she is not entitled either to alimony or to the custody of the children, save temporarily as to an infant so young as not to permit separation from its mother, and save in exceptional circumstances. *See also* King v. King, 191 So. 2d 409 (Miss. 1966) (same); Keyes v. Keyes, 171 So. 2d 489, 490 (Miss. 1965) (same).

[96] *Winfield*, 35 So. 2d at 444 (wife guilty of adultery not entitled to custody of children or alimony except in exceptional circumstances); *see also* King v. King, 191 So. 2d 409 (Miss. 1966) (same); Keyes v. Keyes, 171 So. 2d 489 (Miss. 1965) (same).

[97] McHann v. McHann, 383 So. 2d 823, 826 (Miss. 1980).

[98] *Id.* at 826.

[99] Armstrong v. Armstrong, 618 So. 2d 1278, 1281 (Miss. 1993). Alimony may

nates upon the death of either party or the remarriage of the recipient.[100] In contrast to periodic alimony, lump sum alimony is an award of a fixed amount, payable either all at once, or in a series of payments. Lump sum alimony appears to be a precursor of equitable distribution, awarded in part based on the wife's contribution to the husband's accumulation of property.[101] As an award in the nature of a property transfer, lump sum alimony is generally not modifiable, and is vested as of the date of the court's order.[102] Lump sum alimony is binding on

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be modified to increase or decrease the original award. In *James v. James*, 97-CA-00242-COA, ¶ 26, 724 So. 2d 1098, 1104-05 (Miss. Ct. App. 1998), the court of appeals affirmed a chancellor's reduction of alimony from $1500 to $1300 a month. *Id.* The husband's income was reduced from an average of $9000 a month to approximately $5000 a month, and the payee's income increased from $1333 a month to $2000 a month. *Id.* ¶¶ 17-18, 24, 724 So. 2d at 1103-04. The court noted that a payee's employment is not automatically grounds for reduction, particularly where substantial disparity still exists between the two. *Id.* ¶ 24, 724 So. 2d at 1104. In *In re Dissolution of Marriage of Profilet*, 1999-CA-02068-COA, 2001 WL 111698 (Miss. Ct. App. 2001), the court upheld an upward modification of alimony from $400 a month to $4000 a month. Seventeen years after their divorce, Ms. Profilet requested modification based upon total disability resulting from bipolar disorder. *Id.* ¶¶ 3-4, 2001 WL 111698, at *1. She showed income of $1195 a month and expenses of $4000 a month, while her ex-husband's gross yearly income was $79,477. *Id.* ¶ 4, 2001 WL 111698, at *1. The court held that the change in their respective incomes, along with her inability to continue employment, constituted a material change in circumstances permitting the modification. *Id.* ¶ 10, 2001 WL 111698, at *4.

[100] East v. Collins, 12 So. 2d 133, 135 (Miss. 1943). However, the payor's estate remains liable for any payments that were due and owing at the time of his death. *Id.* The Mississippi Supreme Court reaffirmed this well established rule in *Estate of Peacocke v. Peacocke*, 694 So. 2d 1252, 1253 (Miss. 1997). Mrs. Peacocke sought to recover future alimony payments from the estate of her deceased ex-husband, based upon a Georgia case which allowed such a claim. *Id.* Without deciding whether Georgia or Mississippi law applied, the Court held that the case upon which the appellant relied had been overruled, and that in both Georgia and Mississippi, periodic alimony payments cease upon the death of the payor. *Id.*

[101] In awarding lump sum alimony, courts are to consider: "substantial contribution to accumulation of total wealth of the payor either by quitting a job to become a housewife, or to assist in the spouse's business," length of the marriage, and whether "recipient spouse has no separate income or the separate income is meager by comparison." Tilley v. Tilley, 610 So. 2d 348, 352 (Miss. 1992); Cheatham v. Cheatham, 537 So. 2d 435, 438 (Miss. 1988).

[102] MacDonald v. MacDonald, 683 So. 2d 929, 931 (Miss. 1996) (explaining that periodic alimony is modifiable, because it "is based upon the inherently changing financial ability of the husband to support his wife in the manner to which she is accustomed," while lump sum alimony "is not considered to be in the nature of

the payor's estate and does not terminate at remarriage.[103] Until recently, an award of alimony which contained characteristics of both lump sum and periodic was invalid. The court refused to recognize "hybrid" awards, recharacterizing any ambiguous award as an award of periodic alimony.[104]

B. Alimony in Transition

Alimony in its traditional form is increasingly obsolete in the wake of social and legal changes of the last thirty years. Most significantly, the idea of a husband's one-sided duty to support a wife is both unconstitutional and inconsistent with modern notions of gender equality. United States Supreme Court decisions have clearly established the unconstitutionality of unequal treatment of men and women in family law.[105] In addition, the ideal of gender equality carries with it an increased expectation that homemaker spouses will work outside the home after divorce.[106] No-fault divorce reforms similarly undermined traditional alimony, rendering obsolete the idea that an "innocent spouse" deserves alimony. Finally, equitable distribution was designed in part to alleviate the need for alimony and to replace ongoing entanglement between ex-spouses with a one-time property division.[107]

While these developments undermine the traditional alimony system, it is nonetheless obvious to most observers that in some circumstances, permanent alimony is not only necessary but fair. A modern system would (1) award alimony without regard to fault or gender and (2) aim to encourage post-divorce

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continuing support, but rather a property transfer which is vested in the recipient spouse at the time said alimony is awarded.").

[103] Armstrong v. Armstrong, 618 So. 2d 1278, 1281 (Miss. 1993). This form of alimony may be used as an adjustment in property division, to offset the value of assets received by the payor spouse, or it may be used as alimony—to provide support for a former spouse in need

[104] *Id.* at 1281 (stating that where wording in judgment is not clear if the award is lump sum or periodic alimony it will be deemed periodic).

[105] *See* Orr v. Orr, 440 U.S. 269, 279 (1979) (invalidating state law providing alimony for women but not for men; old notions do not justify gender-based distinctions in family law).

[106] GREGORY, ET AL., *supra* note 1, § 9.01, at 290.

[107] *See* Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994).

self-sufficiency but recognize that not all homemakers can reenter the workforce. However, courts and legislatures have yet to articulate a coherent, comprehensive modern theory of alimony. Current Mississippi law on alimony reflects this national confusion about the role of alimony in divorce.

C. Alimony in Mississippi

Alimony in Mississippi is now gender-neutral. In response to United States Supreme Court decisions, the Mississippi legislature provided that alimony is equally available to husbands and wives.[108] In addition, the Mississippi court abandoned the notion that only innocent spouses are entitled to alimony. In *Hammonds v. Hammonds*,[109] the court held that marital fault is simply a factor for consideration in granting alimony, which should not be denied for the sole reason that a wife was at fault in the divorce. Thus, a wife who committed adultery was entitled to enough support to prevent destitution, particularly where she contributed substantially to the total accumulation of marital assets.[110] Nonetheless, the court continues to recognize that fault may be considered in alimony awards, even in irreconcilable differences divorces.[111] However, while fault may be a factor in reducing alimony, it is not to

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[108] *See* MISS. CODE ANN. § 93-5-23 (1994 & Supp. 2001). *See also* Pratt v. Pratt, 623 So. 2d 258, 261 (Miss. 1993) (stating that statute does not preclude nor mandate alimony for husbands); Walker v. Walker, 389 So. 2d 502, 503 (Miss. 1980) (finding husband's challenge to § 93-5-23 prior to the 1979 amendment untimely and that he lacked standing when he agreed to divorce decree and took no appeal when it was rendered); *see* Neville v. Neville, 97-CA-00860-COA, ¶ 15, 734 So. 2d 352, 356-57 (Miss. Ct. App. 1999) (Chancellor awarded husband 120 months of rehabilitative alimony for contributions made while wife was in medical school, court of appeals revised order to lump sum alimony).

[109] 597 So. 2d 653 (Miss. 1992).

[110] *Hammonds*, 597 So. 2d at 654 (stating where wife is at fault she should not be denied alimony she would otherwise receive).

[111] In Driste v. Driste, 97-CA-01111-COA, ¶ 8, 738 So. 2d 763, 765 (Miss. Ct. App. 1998), the court held that fault is a factor for consideration in both alimony and equitable distribution even in an irreconcilable differences divorce. The court noted that the chancellor has discretion to limit testimony, so that the proceeding does not become in effect a contested divorce. *Id.* ¶ 9, 738 So. 2d at 766. However, it was error to exclude all evidence of adultery. *Id.* ¶ 9.

be used to increase alimony awards. In *Welch v. Welch*,[112] the Court held that while a recipient's fault may be a relevant factor in determining alimony, the payor's fault should not be considered as a reason for increasing the amount of alimony otherwise deemed appropriate.[113] Alimony "is not a punishment and should not be so used."[114]

The Mississippi court recognized two new forms of alimony in the last decade. Rehabilitative alimony is designed to enable a spouse to reenter the workforce without becoming destitute in the interim.[115] Rehabilitative alimony is a monthly payment for a set number of months or years.[116] As a general rule, it is subject to modification and terminates upon remarriage of the recipient or the death of either former spouse.[117] Rehabilitative alimony is similar in most respects to permanent alimony, but is payable for a short number of years rather than indefinitely.[118] In 1999 the Mississippi court created a fourth type –reimbursement alimony.[119] Reimbursement alimony is designed to remedy the potential unfairness where divorce occurs shortly after one spouse puts the other through professional school, but before the couple has accumulated assets which can be equitably distributed.[120] The court noted that a supporting spouse suffers loss of support during the period of schooling, along with a reduced standard of living, all in expectation of future advantages to the marriage.[121]

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[112] 97-CA-01203-COA, 755 So. 2d 6 (Miss. Ct. App. 1999).

[113] *Welch*, 97-CA-01203-COA, ¶ 31, 755 So. 2d at 11 (finding no error where fault was not listed as an issue to determine alimony when both parties were at fault).

[114] *Id.* (quoting Tilley v. Tilley, 610 So. 2d 348, 354 (Miss. 1992)).

[115] Hubbard v. Hubbard, 656 So. 2d 124, 130 (Miss. 1995) (explaining the types of alimony available to a chancellor for award).

[116] *Id.*

[117] Bridges v. McCraken, 97-CA-00987-COA, ¶ 7, 724 So. 2d 1086, 1087 (Miss. Ct. App. 1998) (refusing to make an award to restore wife to previous income level before she lost her job).

[118] *Id.* (stating that rehabilitation alimony has time limit).

[119] Guy v. Guy, 98-CA-00276-SCT, ¶ 17, 736 So. 2d 1042, 1046 (Miss. 1999) (holding that professional degree is not marital property).

[120] *Id.*

[121] *Id.*

In addition to creating new alimony awards with different purposes, the court has blurred the lines between the forms of alimony. A series of recent decisions permit spouses to create hybrid alimony awards that deviate from the traditional forms of alimony. For example, the court recently approved agreed lump sum alimony which terminated at the wife's death and decreased upon remarriage,[122] as well as lump sum alimony which terminated at the husband's death and was replaced by an insurance policy.[123] The extent of discretion to alter alimony forms remains unclear. In *Elliott v. Rogers*,[124] the court upheld agreed hybrid alimony, stating that "it does not matter what label is affixed to these payments," but then noted cryptically, "The question becomes what circumstances would permit a change in this alimony even in the face of the parties' agreement. We do not answer that today, since whatever equities might allow a modification, none is shown here."[125]

Unlike other major areas of divorce, which have undergone comprehensive and fairly systematic revision, alimony is in transition but no new model has clearly emerged. Mississippi adoption of rehabilitative alimony acknowledges current views that many divorced homemakers should be expected to work outside the home. Both the legislature and the courts have recognized that alimony must be available equally to husbands and wives. In keeping with the adoption of no-fault divorce, the court has abandoned the innocent spouse rule. However, it is unclear what form alimony should take, when it should be awarded, in what amount, and even what the award should be

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[122] *See* Murray v. Murray, 98-CA-00471-COA, ¶ 9, 1999 Miss. App. LEXIS 265, at *7 (Miss. Ct. App. 1999), *rev'd in part, aff'd in part*, 754 So. 2d 1200 (Miss. 2000). A provision for support provided that the wife would receive "lump sum alimony" at the rate of $2000 a month for 15 years. *Id.* If she remarried, it would reduce to $1000 a month for the remaining time. *Id.* The wife could not increase the amount; it would not survive her death; and it was income to her and taxable to him. *Id.*

[123] McDonald v. McDonald, 683 So. 2d 929, 930 (Miss. 1996) (upholding an agreement which designated ten years of spousal payments as lump sum alimony and provided that the payments would terminate on the death of the payor, to be replaced by an insurance policy in a lesser amount).

[124] 98-CA-00753-COA, 775 So. 2d 1285 (Miss. Ct. App. 2000).

[125] *Elliott*, 98 CA-00753-COA, ¶ 19, 775 So. 2d at 1289.

called. Currently, Mississippi recognizes four different types of alimony, each with different purposes, tests, and characteristics. The cases offer little guidance as to when one rather than the other is appropriate. Furthermore, a court may award more than one type of alimony in a single case. To the extent that alimony is in a state of flux, Mississippi is not unique. The American Law Institute noted that alimony awards nationwide are "hopelessly confused."[126]

IV. CUSTODY: FROM MATERNAL PREFERENCE TO PARENTAL EQUALITY

Changing gender roles also triggered important revisions in custody laws. Until very recently, most custody decisions were based on one of two assumptions: that a mother was almost always entitled to custody of her children or that a woman found guilty of "misconduct" was almost never entitled to custody of her children. Moral judgments entered into visitation orders as well—court-ordered restrictions on visitation in the presence of an unmarried partner were common. Today, parental equality in custody is recognized by statute, and joint custody is preferred if both parents desire shared custody. Custody decisions are based less on moral judgments, as courts focus more frequently on whether parental behavior genuinely injures a child.

A. The Maternal Preference Rule

For many years, women were routinely granted custody of children based on the maternal preference rule. As one court stated, "Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring . . . "[127] The rule, established in Mississippi law in 1879,[128] was stated fifty years ago as follows: "In all cases where any child is of such tender age as to require

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[126] A.L.I., *supra* note 52, at 5. *See generally id.* §§ 5.01-5.05, at 5.

[127] Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916) (stating court will not deprive mother custody of her children unless she is so unfit as to endanger the welfare of the children).

[128] Johns v. Johns, 57 Miss. 530 (1879).

the mother's care for its physical welfare it should be awarded to her custody, at least until it reaches that age and maturity where it can be equally well cared for by other persons."[129]

According to one authority, the tender years doctrine is "now largely a historical anachronism, as are the stereotypical views that supported it."[130] Some courts abolished the doctrine based on constitutional considerations, holding that a preference for the mother constituted gender based discrimination.[131] In the influential 1983 custody case, *Albright v. Albright*,[132] the Mississippi court noted that the tender years doctrine was undergoing re-evaluation, and that other courts had found the doctrine unconstitutional.[133] Rather than rule on constitutional grounds, the court looked to the Mississippi Code, which states that parents are "the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates" and that neither "has any right paramount to the right of the other concerning the custody."[134] Accordingly, the court abandoned the doctrine, holding that a child's age is but one of several factors to consider in child custody cases.[135]

Custody continues to be awarded to mothers more often than to fathers, probably because the mother is more often the primary caregiver.[136] Nonetheless, fathers are awarded custo-

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[129] Brown v. Brown, 112 So. 2d 556 (Miss. 1959) (quoting AMIS, DIVORCE AND SEPARATION IN MISSISSIPPI 296 (1935)) (finding mother should have custody of three-year-old daughter); Kennedy v. Kennedy, 76 So. 2d 375, 376 (1955) (stating rule of this state is to award custody to competent mother when child is of younger tender age); Scott v. Scott, 69 So. 2d 489, 495 (Miss. 1954) (awarding child to mother based on welfare of child).

[130] GREGORY, ET AL., *supra* note 1, § 11.03[B][1], at 446.

[131] *Ex parte* Devine, 398 So. 2d 686, 695 (Ala. 1981) (stating that the doctrine creates a presumption of fitness of one parent and unfitness of the other); Watts v. Watts, 350 N.Y.S.2d 285, 287 (1973) (stating it a violation of New York law to favor the mother).

[132] 437 So. 2d 1003 (Miss. 1983).

[133] *Albright*, 437 So. 2d at 1005 (Miss. 1983) (discussing *Watts*, 350 N.Y.S.2d at 285 and *Ex parte* Devine, 398 So. 2d at 686).

[134] MISS. CODE ANN. § 93-13-1 (1994 & Supp. 2001).

[135] *Albright*, 437 So. 2d at 1005.

[136] *Id.* at 1005 (stating custody dispute requires "a determination of the parent

dy much more frequently than a decade ago.[137] For example, the Mississippi court awarded custody of five and nine year old girls to the father where he lived in the marital home, had a work schedule which permitted more time with the children, and where the mother had stayed with the children in a boyfriend's home overnight, although it was unclear whether she shared a bedroom with the man.[138] Official recognition of parental equality does not mean, however, that the significance of a mother's role in a child's early years is completely disregarded. The Mississippi court recently noted that while there is no longer a maternal preference, a child's age is still a factor that can be considered in a custody decision.[139]

B. Joint Custody

A quarter century ago, only three states had provisions explicitly recognizing joint custody between divorced parents.[140] Today, the great majority of states authorize some form of joint custody.[141] The Mississippi Code provides that a court may order joint physical custody, joint legal custody, or joint physical and legal custody.[142] Furthermore, there is a statutory presumption in favor of joint custody if the parents both agree to joint custody.[143] Joint physical custody means

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that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care").

[137] *See, e.g.*, Holland v. Holland, ¶¶ 8-10, 1999-CA-00477-COA, 759 So. 2d 1271, 1272 (Miss. Ct. App. 2000) (court upheld chancellor's grant of custody to father, based upon a finding that moral fitness, home environment and the older child's school record favored the father).

[138] Limbaugh v. Limbaugh, 97-CA-01209-COA, 749 So. 2d 1244 (Miss. Ct. App. 1999). *See also* Caswell v. Caswell, 1998-CA-01831-COA, 763 So. 2d 890 (Miss. Ct. App. 2000) (awarding custody to a disabled homemaker father).

[139] Blevins v. Bardwell, 1999-CA-00983-SCT, ¶ 25, 784 So. 2d 166, 173 (Miss. 2001) (but noting that it may not be warranted in a case where the father has had primary care of a two year old for the last ten months prior to the hearing).

[140] ELLMAN, ET AL., *supra* note 6, at 673.

[141] *Id.*

[142] MISS. CODE ANN. § 93-5-24 (1994 & Supp. 2001).

[143] *Id.* In an odd twist of Mississippi law, joint custody may be awarded in a contested fault-based divorce on the request of one parent, but may be awarded in an irreconcilable differences divorce only if requested by both parents. *See* MISS. CODE ANN. § 93-5-24 (1994 & Supp. 2001) ("Joint custody may be awarded

each parent has significant periods of time in which the child resides with them. Joint legal custody means that the parents share decision-making regarding the child's health, education and welfare. Parents who share joint legal custody are required by statute to exchange information concerning the child and to confer in the exercise of decision-making.[144]

No studies indicate the frequency of joint custody awards in Mississippi. In other states, investigation shows that joint legal custody is common, while joint physical custody is ordered only in a small percentage of cases. The most complete study to date showed joint legal custody in seventy-nine percent of cases and joint physical custody in approximately twenty percent of cases.[145] Commentators note that courts are understandably skeptical about the ability of divorcing spouses to work amicably to resolve ongoing issues of scheduling, discipline and other routine matters.

In many states, child support guidelines are inappropriate for joint custody awards. Child support guidelines are based on the assumption that the noncustodial parent spends approximately 20% of his or her time with the child.[146] Under this traditional arrangement, most expenses are borne by the custodial parent–child support essentially reimburses the custodial parent for bearing the noncustodial parent's share of child expenditures. When parents share custody, or when the noncustodial parent has extended visitation, the noncustodial parent bears directly some of the expenses covered in the child support award. Studies indicate that as visitation approaches 35%, the

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where irreconcilable differences is the ground for divorce, in the discretion of the court, upon application of both parents. In other cases, joint custody may be awarded, in the discretion of the court, upon application of one (1) or both parents"). *See also* Dearman v. Dearman, 1999-CA-01106-COA, 811 So. 2d 308 (Miss. Ct. App. 2001) (stating that legislature has not removed the requirement of parental agreement to joint custody in irreconcilable differences divorces, despite the opportunity to do so).

[144] MISS. CODE ANN. § 93-5-24.

[145] *See* ELENOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992), cited in ELLMAN, ET AL., *supra* note 6, at 676 (studying 1,100 families in California in 1984-1985).

[146] *See* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION, § 3.03[a], at 3-31, n.91 (1996 & Supp. 2001)).

noncustodial parent provides a primary home for the child, duplicating the custodial parent's expenditures for housing-related costs.[147] This does not mean, of course, that the custodial parent's expenses for housing are reduced. However, with regard to the other high-ticket items—food, entertainment, travel and child care—the costs are shifted from the custodial parent to the noncustodial parent for the time the child spends in the second home. Some states provide for deviation when visitation reaches a defined percentage of time.[148] Others, including Mississippi, provide that shared parenting arrangements are a deviation factor, without providing guidelines for determining the deviation. Most courts require a showing that the additional time spent with the noncustodial parent results in an increase in costs to the noncustodial parent and a corresponding decrease in costs to the custodial parent.[149] The Mississippi court has yet to address this issue.

C. Marital Fault/Sexual Conduct

Less than forty years ago, the Mississippi Supreme Court stated flatly that a mother who committed adultery would not be granted custody of her children.[150] By 1973 the court continued to recognize the rule but followed it less rigidly: "Where it is clearly to the best interest of a child to remain with the

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[147] *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, ANALYSIS AND RECOMMENDATIONS, Reporter's Notes, 120-21 (Tentative Draft No. 3 1988).

[148] *See, e.g.*, COLO. REV. STAT. § 14-10-115(8) (1999) (stating overnight visitation qualifies for deviation); D.C. CODE ANN. § 16-916.1(n) (1981 & Supp. 2001) (stating that 40% of time with one parent qualifies for deviation); MICH. C.S.G. (stating that 128 days qualifies for deviation).

[149] *See In re* Marriage of Cray, 846 P.2d 944, 953 (Kan. Ct. App. 1993) (granting abatement in child support when child's visitation exceeds two weeks in a month); Terpstra v. Terpstra, 588 N.E.2d 592, 595-96 (Ind. Ct. App. 1992) (finding change in circumstances, which gave father custody 50% of time justified lowering his child support payment); Brazan v. Brazan, 638 So. 2d 1176, 1180 (La. Ct. App. 1994) (reducing father's child support payments where he had child 50% of time and paid for day care); Hoffman v. Hoffman, 870 S.W.2d 480, 483 (Mo. Ct. App. 1994) (finding father is not entitled to deduct pro rata amount of child support for weeks children have visitation with him).

[150] Winfield v. Winfield, 35 So. 2d 443, 444 (Miss. 1948) (finding wife guilty of adultery not entitled to custody of children or alimony except in exceptional circumstances); *see also* Keyes v. Keyes, 171 So. 2d 489, 490 (Miss. 1965) (same).

mother, it may be proper to grant custody to the mother."[151] In 1985, the court reversed its position, stating that sexual behavior is not a sufficient basis for a custody decision: "In earlier decisions, custodial law was used to punish and penalize spouses guilty of marital fault. The development of exceptions to the general rule evidenced a changing attitude. Generally, courts now consider the best interest rule, not marital fault, as the primary guide in custody determinations.[152]

While marital fault and moral judgments still enter custody decisions under the *Albright* factor of "moral fitness of [the] parents,"[153] they clearly are accorded a great deal less weight. In one recent decision, the supreme court reversed a chancellor's grant of custody to the father where the decision was based primarily on the mother's alleged homosexual relationship, without regard to other factors such as continuity of care.[154] The court held that while homosexuality may be considered in a custody decision, courts should not base a decision on that factor to the exclusion of others.[155] However, the court has upheld decisions where the court below based its award in large part upon sexual behavior, but also cited other factors, or where other factors appeared in the record and the court did not explicitly base its finding on sexual behavior.[156]

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[151] Yates v. Yates, 284 So. 2d 46, 47 (1973) (finding sufficient special circumstances to award child to adulterous mother).

[152] Carr v. Carr, 480 So. 2d 1120, 1123 (Miss. 1985) (affirming award of custody to father where adulterous behavior of mother was only single factor considered by trial court); *see also* Moak v. Moak, 631 So. 2d 196, 197 (Miss. 1994) (stating that custody is not an award to one parent for a good act nor is it to be denied as punishment for a bad act); McAdory v. McAdory, 608 So. 2d 695, 702 (Miss. 1992) (finding error where chancellor awarded custody based on adulterous acts of mother where adultery was not proven).

[153] *See* Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) (listing the relevant factors to be considered when awarding custody).

[154] Hollon v. Hollon, 2000-CA-00141-SCT, 784 So. 2d 943 (Miss. 2001).

[155] *Hollon*, 2000-CA-00141-SCT, ¶¶ 37-38, 784 So. 2d at 952 (finding reversible error where chancellor awarded custody to the father based on mother's homosexuality).

[156] *See, e.g.*, Chamblee v. Chamblee, 637 So. 2d 850 (Miss. 1994) (awarding custody to father where mother had an affair); *Carr*, 480 So. 2d at 1120 (finding evidence supported custody award to father but adultery alone did not disqualify mother from having custody).

The increased acceptance of non-marital relationships is also reflected in the court's decisions regarding modification of custody and restrictions on visitation. In a 1948 case custody went to the husband because of the wife's adultery.[157] The court remanded the case for the chancellor to consider "whether the former wife shall be granted the *privilege of visitation* to the children, and, if so, when and under what conditions and with what precautions."[158] In 1975, the court held that a mother's "lewd and lascivious" behavior in entertaining men overnight was per se harmful to her children.[159] The chancellor modified the children's custody so that their father received primary custody even though he did not find that the behavior actually had an adverse impact on the children.[160] The court affirmed, stating that "It is well recognized that certain conditions adversely affect the welfare of children."[161] In contrast to these cases, the court of appeals in 1999 reversed a chancellor's modification of custody based primarily upon the fact that the mother had cohabited with three different men after the divorce.[162] The chancellor based his ruling solely on the mother's cohabitation.[163] Reversing, the court of appeals held that cohabitation is a reason for modification only if can be shown to adversely affect the child, in some manner more specific than simply the knowledge of sexual relations between

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[157] Winfield v. Winfield, 35 So. 2d 443 (Miss. 1948).

[158] *Winfield*, 35 So. 2d at 444 (emphasis added).

[159] Pike v. Pike, 317 So. 2d 897, 898 (Miss. 1975).

[160] *Pike*, 317 So. 2d at 898.

[161] *Id.*

[162] Sullivan v. Stringer, 97-CA-01645-COA, ¶ 21, 736 So. 2d 514, 518 (Miss. Ct. App. 1999). In *Kavanaugh v. Carraway*, the father petitioned for modification when the mother cohabited with a man for five weeks. 435 So. 2d 697, 698-99 (Miss. 1983). At the time of the hearing, the couple had married, but the chancellor granted custody to the father nonetheless. *Id.* at 699. The supreme court held that detrimental effect could not be presumed from such conduct, and must instead be shown. *Id.* at 700. The court noted that such behavior was not condoned, and was in fact, condemned, but in the instant case did not constitute a material change with adverse affect. *Id.*; *see also* Phillips v. Phillips, 555 So. 2d 698 (Miss. 1989) (reversing chancellors' award of custody to father because mother's boyfriend occasionally spent night at her house, and mother "showed no remorse").

[163] *Sullivan*, 97-CA-01645-COA, ¶ 10, 736 So. 2d at 516.

unmarried adults.[164] In a number of recent cases, the court has also reversed chancellor's orders prohibiting noncustodial parents from visiting with their children in the presence of members of the opposite sex or specific named persons.[165] The court recently extended the same approach to visitation with homosexual noncustodial parents. In *Weigand v. Houghton*,[166] the court reversed a chancellor's order imposing restrictions on a child's visitation with his father in the presence of his father's male partner.[167]

V. CHILD SUPPORT: FROM STATE DISCRETION TO FEDERAL MANDATE

A little over a decade ago, child support awards were the exclusive province of the states. Now, Congressional enactments dictate most child support laws. The increase in post-divorce poverty rates for women and children were the catalyst

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[164] *Id.* ¶ 16, 736 So. 2d at 517.

[165] *See* Rushing v. Rushing, 98-CA-00188-SCT, 724 So. 2d 911 (Miss. 1999) (reversing chancellor's order restricting mother's visitation with her child in the company of any man not a member of her family, simply because she conceded adultery); Harrington v. Harrington, 648 So. 2d 543 (Miss. 1994) (reversing limits on a father's visits with his daughters in a home he shared with his girlfriend, since there was no proof the relationship was detrimental to the girls); Chamblee v. Chamblee, 637 So. 2d 850 (Miss. 1994) (reversing a chancellor's order that a child visiting with the non-custodial mother could never be in the presence of any man not related to her); Carr v. Carr, 98-CA-00097-COA, 724 So. 2d 937 (Miss. Ct. App. 1998) (reversing a chancellor's order restricting father's visitation in the presence of woman he had married without obtaining valid divorce from the children's mother); *see also* Dunn v. Dunn, 609 So. 2d 1277 (Miss. 1992) (reversing order that father could not have children in presence of woman with whom he had affair, absent evidence of harm to the children). *But see* Robison v. Robison, 97-CA-00889-SCT, 722 So. 2d 601 (Miss. 1998) (upholding chancellor's order limiting a father's overnight visitation because he lived with his girlfriend, even though no specific finding of adverse circumstances was made, since there was testimony that the child was traumatized by the visitation and needed treatment for depression and suicidal threats).

[166] 97-CA-01246-SCT, 730 So. 2d 581 (Miss. 1999).

[167] *Weigand*, 97-CA-01246-SCT, ¶ 28, 730 So. 2d at 587 (refusing to modify custody because of the father's homosexual lifestyle and reversing chancellor's order banning the father from any visitation with his son in the presence of the father's partner). *But see* White v. Thompson, 569 So. 2d 1181 (Miss. 1990) (upholding visitation limits on a lesbian mother).

for federal intervention into child support in spite of historical deference to states in family law matters.

A. State Court Discretion

Until recently, child support awards were largely within the discretion of state family court judges.[168] In Mississippi, chancellors exercised discretion based upon criteria established by the Mississippi Supreme Court in *Brabham v. Brabham*.[169] Chancellors were to consider the health, income, and earning capacity of both parents, the reasonable needs of the child and wife, the necessary living expenses of the husband, tax consequences to both parties, whether the wife had the free use of home, furnishings or automobile, and other such relevant facts and circumstances.[170] Child support orders were overruled only upon a showing of abuse of discretion.[171]

B. Federal Intervention

As a result of this broad discretion, awards lacked consistency and predictability even within each state.[172] Of even greater concern, some single parent households did not have support awards,[173] many of those who did had seriously inadequate awards,[174] and many had awards that were ignored, in arrears, or underpaid.[175] Concern over the lack of support for

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[168] *See* CLARK, supra note 7, § 18.1, at 360. *see also* UNIF. MARRIAGE AND DIVORCE ACT § 309, 9A U.L.A. § 400 (1987).

[169] 84 So. 2d 147 (Miss. 1955).

[170] *Brabham*, 84 So. 2d at 153.

[171] Hartley v. Hartley, 317 So. 2d 394, 395 (1975) (affirming where chancellor did not abuse discretion).

[172] *See* Kenneth R. White & R. Thomas Stone, Jr., *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 FAM. L.Q. 75-76, 83 (1976).

[173] *See* Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 326 (1991) (finding in 1984 that 39% of custodial parents had no child support award).

[174] *See* Lucy Marsh Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DEN. L.J. 21, 36 (1979) (noting that support orders are often lower than car payments).

[175] *See* CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CHILD SUPPORT AND ALIMO-

children in single parent households and the wide variation in support orders prompted federal intervention in the 1970s. Over the next two decades, Congress enacted a series of laws resulting in an unprecedented federal presence in the traditionally state-governed area of family law.[176] Today, state establishment and enforcement of child support is significantly directed by federal legislation.

The most significant step affecting consistency of awards came in 1988, with the Family Support Act.[177] The FSA required that: (1) states establish child support guidelines that operate as a rebuttable presumption regarding the proper support award, rather than as advisory standards; (2) the guidelines are rebuttable only upon a written finding that application would result in an unjust or inappropriate award; (3) states establish criteria to be used for deviation from the guidelines; and (4) states provide that the guidelines be used in actions to modify awards.[178] The Family Support Act of 1988 was the catalyst for a national overhaul of standards for child support awards. In a brief span of time, states discarded the subjective factors of "need" and "ability to pay" for structured guidelines conforming to the FSA mandate.

The flat percentage of income method used by fourteen states including Mississippi is the simplest to administer.[179]

NY: 1985 (Current Pop. Rep., Series P-23,. No. 154, 1989), *cited in* MORGAN, *supra* note 146, § 1.01, at 1-4, n.11. The report estimated that one quarter of custodial mothers received no support at all and only one-half received the full amount ordered. *Id.*

[176] For a discussion of Congressional enactments, see Deborah H. Bell, *Child Support Orders: The Federal-State Partnership Part I*, 69 MISS. L.J 597, 598-600 (1999).

[177] 42 U.S.C. §§ 651-669 (1991).

[178] *See id.* § 667 (providing for IV-D agency review and adjustment of support orders at least once every four years); *id.* § 666(a)(10)(A)-(B) (providing review in both AFDC and non-AFDC support cases in which custodial parent seeks assistance of state IV-D agency); *id.* § 653(a) (addressing enforcement by creating Federal Parent Locator Service).

In addition to the federally mandated guidelines, Congress in 1992 passed the "deadbeat dad" or Child Support Recovery Act, which created criminal liability for a parent who is more that $5000 in arrears in support or over one year in arrears. 18 U.S.C. § 228 (1994).

[179] *See* MORGAN, *supra* note 146, at 1-13 to 1-14.

Guidelines based on the flat percentage method provide that a noncustodial parent's basic support obligation is a certain percentage of income.[180] The percentages vary based upon the number of children for whom support is requested. The percentages are applied to the non-custodial parent's income without consideration of the custodial parent's income. If, for example, the non-custodial parent's adjusted income is $1600 a month, and the percentage applicable to two children is 20%, the noncustodial parent pays $320 a month. The custodial parent is presumed to use an equal percentage of income on direct expenditures.

C. Mississippi Guidelines

The indeterminate standards of need and ability were replaced in 1989 when Mississippi adopted statutory child support guidelines pursuant to the federal mandate. The state adopted the flat percentage method of calculating support, specifying that the guidelines constitute a rebuttable presumption in both awards and modifications of child support.[181] The statute was amended the following year to establish lower percentages which remain in effect today: 14% for one child, 20% for two; 22% for three; 24% for four; and 26% for five or more.[182]

Application of the Mississippi guidelines is a five step process. First, the court must determine gross income from all includable sources. Second, various deductions are then used to arrive at adjusted gross income. Third, the appropriate percentage is applied to adjusted gross income to arrive at basic child support. Fourth, additional sums may be added to the basic child support for expenses not covered in the basic support. Finally, the court may deviate from the presumptively correct

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[180] *See, e.g.*, ALASKA CIV. R. 90.3 (1999); GA. CODE ANN. § 19-5-12 (1999); MISS. CODE ANN. § 43-19-101 (West Supp. 1999).

[181] MISS. CODE ANN. § 43-19-101 (Lexis Supp. 1999). *See also* MISS. CODE ANN. § 43-19-103 (1972) (rebuttable presumption).

[182] MISS. CODE ANN. § 43-19-101(1).

basic support award upon consideration of deviation factors.[183]

The statutory percentages are applied to the noncustodial parent's adjusted gross income, without consideration of the custodial parent's income. Adjusted gross income is defined as gross income[184] less deductions for federal, state, and local taxes,[185] social security contributions,[186] mandatory retirement and disability contributions,[187] and existing child support orders.[188] The court also has discretion to deduct an "appropriate" amount for the payor's children living in the home with him or her.[189]

The court may deviate from the guidelines only upon a written finding that application of the guidelines would be inappropriate, based upon criteria set out in section 43-19-

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[183] MISS. CODE ANN. § 43-19-101(3).

[184] MISS. CODE ANN. § 43-19-101(3)(a). Gross income includes income from all potential sources, including, but not limited to:

> wages and salary income; income from self employment; income from commissions; income from investments, including dividends, interest income and income on any trust account or property; absent parent's portion of any joint income of both parents; workers' compensation, disability, unemployment, annuity and retirement benefits, including an individual retirement account (IRA); any other payments made by any person, private entity, federal or state government or any unit of local government; alimony; any income earned from an interest in or from inherited property; any other form of earned income; and gross income shall exclude any monetary benefits derived from a second household, such as income of the absent parent's current spouse.

Id.

[185] MISS. CODE ANN. § 43-19-101(3)(b)(i). This does not include any tax withholding or payment over actual tax liability for the year. *Id.*

[186] MISS. CODE ANN. § 43-19-101(3)(b)(ii).

[187] MISS. CODE ANN. § 43-19-101(3)(b)(iii).

[188] MISS. CODE ANN. § 43-19-101(3)(b) & (c) (Lexis Supp. 1999).

[189] MISS. CODE ANN. § 43-19-101(3)(d). In *Bailey v. Bailey*, 97-CA-00577-SCT, ¶ 11, 724 So. 2d 335, 336 (Miss. 1998). The court stated that the discretionary adjustment provision for children living in the home does not apply to allow a noncustodial parent to reduce an obligation to prior children. *Id.* § 11, 724 So. 2d at 336. Otherwise, a parent could "sire himself out of his child support obligation. *Id.* at 339. In a subsequent case, the court affirmed that afterborn children do not warrant downward modification of prior child support decrees. *See* Turner v. Turner, 97-CA-01556-COA, ¶ 21, 744 So. 2d 332, 337 (Miss. 1999) ("The addition to a noncustodial parent's family cannot be said to reasonably affect the ability of the parties to abide by the terms of the original divorce decree.").

103.[190] The deviation criteria include extraordinary medical, psychological, dental, or educational expenses, or special needs of the child, shared parental arrangements, age of the child, independent income of the child, spousal support to the custodial parent, total available assets of the parents, seasonal variations in income or expenses of one or both spouses, and any other adjustment needed to achieve an equitable result.[191]

Also as a result of federal mandates, Mississippi has adopted enhanced remedies for collecting child support, both under the initial order and when an order is in arrears. Most support orders are now accompanied by an order for income withholding. As one child support authority states, "Income withholding is no doubt the king of child support collection tools."[192] Income withholding is required for any support order issued, modified, or found to be in arrears after January 1, 1994, unless there is good cause not to require immediate income withholding, or if both parties agree in writing to an alternative arrangement.[193] Other new enforcement tools include automatic judgment liens for arrearages, seizure of accounts, tax refunds, workmen's compensation, and other payments, license revocation, and new tracking systems for locating delinquent payors[194]

As a result of the mandated guidelines, child support awards are probably more predictable than any other aspect of divorce litigation. In addition, expanded enforcement mechanisms increase custodial parent's chances of collecting support from a reluctant payor.

VI. AGREEMENTS ALTERING RIGHTS DURING MARRIAGE AND UPON DIVORCE

Until recently, spousal agreements related to divorce were considered void as against public policy even though other

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[190] MISS. CODE ANN. § 43-19-101(2).

[191] MISS. CODE ANN. § 43-19-103.

[192] Teresa A. Myers, *State Child Support Programs: Necessity Inspires Ingenuity*, 11 No. 4 DIVORCE LITIGATION 71, 72 (1998).

[193] MISS. CODE ANN. § 93-11-103(2).

[194] *See* Deborah H. Bell, *Child Support Orders, The Common Law Framework Part II*, 69 MISS. L.J. 1063, 1100-22 (2000) (describing enforcement mechanisms).

spousal agreements were permitted. In the face of rising divorce rates, a ban on agreements fixing rights upon divorce was difficult to justify.

Agreements altering property rights during marriage or at death have long been recognized as legitimate family planning devices. Courts have approved agreements dealing with interspousal transfers of property, waiver of inheritance rights, execution of wills, and provision of insurance.[195]

In contrast, agreements purporting to resolve financial matters at divorce were considered void as against public policy until recently.[196] Premarital agreements which included provisions for property and support in the event of divorce were considered to encourage divorce and therefore to violate public policy in support of marriage.[197] Banning prenuptial agreements became less defensible as the divorce rates soared. The Florida case of *Posner v. Posner*[198] began the modern era of antenuptial agreements. The Florida court noted that "With divorce such a commonplace fact of life, it is fair to assume that many prospective partners . . . might want to consider and discuss also—and agree upon if possible – the disposition of their property . . . in the event their marriage, despite their best efforts, fails."[199] The Uniform Premarital Agreement Act, drafted in 1983, has now been adopted in twenty-four states,[200] and other states have judicially recognized the valid-

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[195] Freedom to alter marital property rights by contract without court approval does not, however, extend to agreements regulating behavior during marriage or rights and obligations with regard to children. *See generally* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How we Think About Marriage*, 20 WM. & MARY L. REV. 148 (1998). Courts have refused to enforce pre- and postnuptial agreements specifying the amount of support required during the marriage, attempting to regulate sexual relationships, or limiting the spouses' right to seek divorce. CLARK, *supra* note 7, § 1.1, at 15-17.

[196] *See* J.W. BUNKLEY & W.E. MORSE, AMIS ON DIVORCE & SEPARATION IN MISSISSIPPI, § 10.02, at 240 (1957) (agreement in anticipation of divorce is void); Bix, *supra* note 195, at 145, 150 (noting that agreements regulating rights at divorce considered to encourage divorce).

[197] GREGORY, ET AL., *supra* note 1, § 4.03, at 98.

[198] 233 So. 2d 381 (Fla. 1970).

[199] *Id.* at 384.

[200] *See* GREGORY, ET AL., *supra* note 1, § 4.03, at 100.

ity of prenuptial agreements with provisions regarding divorce.[201]

While general principles of contract law govern marital agreements, courts scrutinize pre- and postnuptial agreements more carefully than arms-length contracts. Spouses and fiancees are considered to be in a fiduciary relationship with heightened duties of fairness toward each other. Courts require not only that both parties enter the agreement voluntarily, but also that they fully disclose their financial condition. In addition, the agreement must be substantively fair.[202] Finally, while independent counsel is not an absolute requirement in most states, the existence of counsel is an important consideration in the validity of an agreement.[203]

As early as the mid-1800s, the Mississippi court indicated its receptiveness to prenuptial agreements settling property rights at death.[204] Similarly, the Mississippi court has long approved postnuptial agreements fixing property and support rights upon death.[205] The agreement to marry is sufficient

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[201] *See* ELLMAN, ET AL., *supra* note *6, at 800.

[202] The Uniform Premarital Agreements Act, however, appears to provide that an agreement is enforceable if there was full disclosure or, in the absence of full disclosure, that the agreement is fair. *See* Bix, *supra* note 195, at 154-55 (discussing Unif. Premarital Agreement Act, § 6(a)(1), 9B U.L.A. at 376); *see also* CLARK, *supra* note 7, § 1.1.

[203] CLARK, *supra* note 7, § 1.1, at 4-5. *See* LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS 652-55 (1937). Comments to Section 6 of the UPAA state that while independent counsel is not required, absence of independent counsel may affect the determination of unconscionability. 9B, U.L.A. 369, § 6 Comment.

[204] Gorin v. Gorin, 38 Miss. 205 (1859); *see* Watson v. Duncan, 37 So. 125 (Miss. 1904) (enforcing husband's prenuptial agreement to forego spousal rights at wife's death); Stevenson v. Renardet, 35 So. 576 (Miss. 1904) (finding prenuptial contract is "like any other" and can be rescinded by agreement of the parties). The *Gorin* court stated, "Antenuptial marriage settlements, fairly made, are, under all circumstances, favored and supported by courts of equity." *Gorin*, 38 Miss. at 210.

[205] *See* Sadler v. Lee, 98 So. 2d 863, 866 (Miss. 1957) (holding mutual promises to relinquish right of renunciation or will are adequate consideration for agreement); Wiley v. Gray, 36 Miss. 510 (Miss. 1858) (holding post-nuptial agreements to transfer property for consideration enforceable against creditors and purchasers); *see also* Roberts v. Roberts, 381 So. 2d 1333, 1335 (Miss. 1980) (noting general principles of contract law apply; court is to construe document as a whole). *Compare* Kirby v. Kent, 160 So. 569 (Miss. 1935) (finding separation agreement

consideration to support a prenuptial agreement.[206] After marriage, however, an agreement altering marital rights must be supported by independent consideration.[207] Furthermore, because of the increased possibility of overreaching after marriage, some courts hold postnuptial agreements to an even higher standard than prenuptial contracts.[208] In one of the few modern Mississippi cases analyzing postnuptial agreements, *In re Will of Johnson*, the court judged a spousal agreement by an arguably higher, unconscionability, standard rather than by "fairness."[209]

The Mississippi court first approved pre-nuptial agreements in contemplation of divorce in 1995.[210] The court noted that antenuptial contracts were once considered incompatible with the marriage contract and tended to provide inducements to end a marriage. However, the court recognized the trend departing from the traditional view, held that such agreements were not void, and rejected the assumptions that such contracts encouraged divorce. The court imposed the generally accepted requirements of fairness and full disclosure. Since 1995, there has been little development of the requirements for enforceable antenuptial agreements.

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did not waive rights at death prior to divorce), *with* Wyatt v. Wyatt, 32 So. 317 (Miss. 1902) (holding family settlements for fair and adequate consideration are enforceable).

[206] *See* Unif. Premarital Agreements Act, 9B U.L.A. 372 (no consideration required).

[207] *See Sadler*, 98 So. 2d at 866 (holding mutual promises to relinquish right of renunciation are adequate consideration for agreement); OLDHAM, *supra* note 46, § 4.03[2][g], at 4-23 (noting mutual waiver of property rights sufficient consideration to support a postnuptial agreement).

[208] *See generally* GREGORY, ET AL., *supra* note 1 § 4.03-4.05, at 97-109.

[209] *In re* Will of Johnson, 351 So. 2d 1339, 1341 (Miss. 1977). The wife agreed to give up the right to renounce her husband's will, while he promised to provide her with a life estate in the homestead even if she remarried. *In re Will of Johnson*, 351 So. 2d at 1340. The court found this to be an "almost illusory" exchange. *Id.* at 1341-42. The court also examined procedural unconscionability, noting that the husband took his wife to his attorney's office and requested that she sign the agreement without prior notice, an opportunity to read the entire agreement, or an explanation of the terms of the agreement. *Id.*

[210] Smith v. Smith, 656 So. 2d 1143 (Miss. 1995).

VII. RIGHTS AND DUTIES DURING MARRIAGE

The forces that produced such radical alteration in marital rights regarding divorce affected rights between spouses in an intact marriage as well. Substantively, marital rights look quite different today than a century ago, due largely to changing notions of gender equality and male/female roles in marriage. In the last fifty years, the most dramatic changes in rights between spouses involve spousal duties of support and rights involving tort actions.

At early common law, women became legal non-entities upon marriage. The "disability of coverture" deprived married women of the power to contract, to sue and be sued, and to manage and control property.[211] A woman's husband had the right to use and manage her property and to receive all income from the property.[212] Spousal duties were tied to gender – a husband owed his wife a duty of support and in return she had a duty to provide services to her husband.[213] Husband and wife were regarded by the common law as one person in law.[214] Accordingly, spouses could not sue each other in tort.[215]

By the end of the nineteenth century, most state legislatures enacted "Married Women's Property Acts" removing the disability of coverture. The Mississippi Legislature was one of the leaders in this reform, providing in 1839 that married women could own real and personal property.[216] While the

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[211] See discussion of common law disabilities of married women in CLARK, *supra* note 7, § 7.1, at 286-288.

[212] CLARK, *supra* note 7, § 7.1, at 287.

[213] Henderson v. Henderson, 43 So. 2d 871, 872 (Miss. 1950) ("One of the most fundamental duties growing out of the law of domestic relations is the duty of the husband to support the wife").

[214] According to Blackstone, the common law treatment of married women was based on the legal fiction that the husband and wife were one person; thus, the woman's legal existence "is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 BLACKSTONE COMMENTARIES, 442, *quoted* in BUNKLEY & MORSE, *supra* note 197, § 13.00, at 259.

[215] McNeal v. Adm'r of Estate of McNeal, 254 So. 2d 521 (Miss. 1971) (holding one spouse has no right of action against the other to recover damages for personal injuries caused by the other).

[216] BUNKLEY & MORSE, *supra* note 197, § 13.01m at 260. For current versions

Married Women's Property Act abolished disabilities related to property and contract rights, it had no effect on common law rules prohibiting tort actions between husband and wife.[217] Nor did it alter unequal marital support obligations.[218] The positions of husband and wife remained unequal in a number of respects until Supreme Court decisions in the 1970s established that gender-based distinctions in family law are, for the most part, unconstitutional.[219] Tort law restrictions on marriage altered as the legal fiction of husband and wife as "one" diminished.

A. The Duty of Support

At common law, the husband had a duty to support his wife and the wife to provide services to her husband without compensation.[220] In spite of considerable lip service to the husband's duty of support,[221] courts rarely enforced the duty

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of the MWPA, see MISS. CONST. OF 1890, ART. IV, § 94 (stating legislature may not create distinction between men and women with regard to property rights) (emphasis added); *see also* MISS. CODE ANN. § 93-3-1 (disabilities of coverture "totally abrogated").

[217] Austin v. Austin, 100 So. 591 (Miss. 1924).

[218] *See* Galtney v. Wood, 115 So. 117 (Miss. 1928); BUNKLEY & MORSE, *supra* note 197, § 13.04, at 266.

[219] *See* Orr v. Orr, 440 U.S. 269 (1979) (invalidating state law providing alimony for women but not for men; old notions do not justify gender-based distinctions in family law).

[220] *See* Miller v. Miller, 298 So. 2d 704, 706 (Miss. 1974) (stating that notion that wife owes husband services without compensation in return for support "has been eroded by the passage of time" and has "strictly limited validity and application, if it continues to have any at all"). At one time, Mississippi law provided criminal sanctions against a husband who deserted or refused to support his wife. 1920 Miss. Laws, ch. 212, § 1. The court has interpreted this statute as requiring that the wife be left in a condition of extreme want, without resources for the basic necessities of life. *See* Moorman v. State, 93 So. 368, 368 (Miss. 1922) (dismissing indictment because deserted wife had 40 acres, milk cows and other stock). Mississippi law currently criminalizes non-support of children, but not non-support of a spouse. Parents may be prosecuted for abandonment or neglect. *See* MISS. CODE ANN. § 97-5-3 (2000) (stating that any parent who deserts or wilfully neglects or refuses to provide support is guilty of a felony.) Prior to 1995, the statute required a showing that the children were left "in destitute and necessitous circumstances." *See* Knowles v. State, 96-KA-00681-SCT, ¶ 4, 708 So. 2d 549, 551 (Miss. 1998); Bryant v. State, 567 So. 2d 234, 235 (Miss 1990).

[221] Henderson v. Henderson, 43 So. 2d 871, 872 (Miss. 1950) (stating husband's

directly within the intact marriage.[222] No Mississippi case was found in which the court ordered a husband living with his wife to provide her with direct support. However, the common law indirectly enforced the husband's duty of support through the doctrine of necessaries. And, if the husband abandoned the wife, courts ordered direct support in the form of separate maintenance.

The common law doctrine of necessaries allowed suit against a husband by merchants who provided basic necessities to his wife.[223] In Mississippi, the doctrine was available upon proof that a husband failed to provide his wife with necessaries "convenient and suitable to their station in life."[224] As late as 1944, the court held that a woman treated at her husband's request was not personally liable for an emergency room bill: "To bind her personally, it must be made to appear that necessaries were supplied on her individual credit, where credit is given . . . to [both] husband and wife, the wife is not liable."[225]

In 1993, the Mississippi court abolished the doctrine of necessaries in *Govan v. Medical Credit Services, Inc.*[226] Mr. Govan argued that imposing liability on him for his former wife's hospital bills constituted gender-based discrimination violative of the Equal Protection Clause. The court noted that

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obligation to provide a home measured by living standards of persons of "their social rank and standard of living, within the means and earning power of the husband.").

[222] Refusal to intervene in the intact family is based on deference to family privacy and concerns about judicial involvement in domestic disputes over household decisions. In the often-cited case of *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953), the court refused to order the husband, a man of considerable wealth, to provide basic conveniences to his wife such as indoor plumbing. The court held that public policy required a hands-off approach, even if the husband's attitude "leaves little to be said in his behalf," so long as the home is intact. *Id.* at 342.

[223] CLARK, *supra* note 7, § 6.3, at 265.

[224] *See* Skehan v. Davidson Co., 145 So. 247, 248 (Miss. 1933) (finding husband not liable for debt contracted by wife without his knowledge or use of his credit in the absence of proof of lack of support); Woolbert v. Lee Lumber Co., 117 So. 354 (Miss. 1928) (recognizing husband's duty to provide necessaries, but finding that a $16,000 home was not a necessary where the homestead exemption was only $3000).

[225] McLemore v. Riley's Hospital, 20 So. 2d 67, 68 (Miss. 1944).

[226] 621 So. 2d 928 (Miss. 1993).

some states remedy gender inequality in the necessaries doctrine by imposing the duty on both spouses.[227] The court opted instead to abolish the doctrine, holding that a spouse is not liable for the debts of the other in the absence of an express agreement to assume the obligation.[228]

The second common law remedy for non-support, separate maintenance, is a "judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled."[229] Historically, separate maintenance is properly awarded against a husband who abandons and refuses to support his wife, without fault on her part.[230] While a wife need not be "totally blameless," she is not entitled to support if her conduct materially contributed to the separation.[231] Writers on the topic uniformly agree that separate maintenance must be available to both husband and wife.[232] Recent Mississippi separate maintenance cases still refer to the "husband's" duty of support;[233] however, the court has acknowledged in dicta that a unilateral duty to support may be constitutionally sus-

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[227] *Govan*, 621 So. 2d at 930 (citing cases from Louisiana and Ohio).

[228] *Id.* at 929-30. The court acknowledged a strong public policy favoring mutual duties of support. *Id.* at 929-30. But it also recognized the importance of individual autonomy. The court noted that otherwise, one spouse could deplete the resources of the other. *Id.*

[229] Kennedy v. Kennedy, 650 So. 2d 1362, 1367 (Miss. 1995); *see also* Gray v. Gray, 484 So. 2d 1032, 1033 (Miss. 1986) (finding $250.00 a month inadequate support).

[230] Thompson v. Thompson, 527 So. 2d 617, 621 (Miss. 1988); Bridges v. Bridges, 330 So. 2d 260, 262 (Miss. 1976).

[231] *See* Robinson v. Robinson, 554 So. 2d 300 (Miss. 1990); *see also* King v. King, 152 So. 2d 889 (Miss. 1963) (rejecting analogy to *Winkler* rule that wife at fault may be entitled to alimony).

[232] *See* CLARK, *supra* note 7, § 6.4, at 268; SHELTON HAND, MISSISSIPPI DIVORCE, ALIMONY, AND CHILD CUSTODY, § 2-11, at 37, n.7.

[233] *See* Stanford v. Stanford, 97-CA-00988-COA, ¶ 3, 734 So. 2d 359, 360 (Miss. 1999) (stating *wife* entitled to "be maintained in the same standard of living"); Wilbourne v. Wilbourne, 1998-CA-00983-COA, ¶ 7, 748 So. 2d 184, 187-88 (Miss. Ct. App. 1999) (same). To date, the Mississippi court has not awarded separate maintenance to a husband deserted by his wife. *But see* Steen v. Steen, 641 So. 2d 1167, 1169 (Miss. 1994) (granting to husband who did not want divorce "medical insurance for the children and costs of court, in place of separate maintenance").

pect.[234] Since the court and legislature have already acknowledged that alimony is gender-neutral, the court will surely hold, when the question is properly before the court, that separate maintenance is equally available to an abandoned husband.

B. Tort Actions

At common law, the notion of marital "oneness" kept one spouse from suing the other in tort for injuries. Although the Married Women's Property Acts allowed spouses to litigate property rights over one hundred years ago, interspousal suits for personal injuries continued to be barred until fairly recently.[235] The doctrine of interspousal tort immunity was most frequently justified as necessary to preserve marital harmony and to prevent fraud by spouses on insurance companies.[236] Growing dissatisfaction with the doctrine finally resulted in its abrogation in most states in the last few decades.

In 1988, the Mississippi court abolished interspousal immunity to permit a woman to sue her ex-husband for damages as a result of physical abuse during the marriage.[237] The court stated that (1) the notion of marital "oneness" is no longer a viable legal concept; (2) the argument that permitting marital tort suits will endanger domestic tranquility is "illusory;" and (3) permitting suits between spouses will no more

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[234] In *Robinson v. Robinson*, 544 So. 2d 300, 306 (Miss. 1990), the court refused to address the husband's equal protection challenge since no separate maintenance was awarded. The court did state that *Orr v. Orr* and the resulting statutory amendment for alimony was "inapplicable" to a case where divorce is not granted, and that, in the proper case, "the governmental objectives in separate maintenance suits will have to be addressed." *Id.*

[235] McNeal v. Adm'r of Estate of McNeal, 254 So. 2d 521 (Miss. 1971) (holding one spouse has no right of action against the other to recover damages for personal injuries caused by the other); Ensminger v. Campbell, 134 So. 2d 728 (1961) (finding wife had no cause of action against former husband's estate for injuries in automobile accident); Ensminger v. Ensminger, 77 So. 2d 308 (1955) (dismissing wife's suit for injuries caused by husband's negligent operation of automobile because no liability exists between husband and wife for personal tort).

[236] *See* GREGORY, ET AL., *supra* note 1, § 7.02, at 194.

[237] Burns v. Burns, 518 So. 2d 1205 (Miss. 1988) (finding marital harmony already destroyed; possibility of fraud exists in all lawsuits).

promote fraud than in other litigation.[238] Accordingly, spouses may sue one another for both intentional torts and negligent acts.

With the abrogation of interspousal tort immunity, a growing body of law addresses the viability of tort actions based upon domestic violence during the marriage. A number of difficult issues are presented by such suits, involving questions of res judicata, collateral estoppel,[239] and waiver[240] where tort suits are brought after divorce. In addition, questions arise regarding the running of the statute of limitations[241] and the

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[238] *Id.* at 1208-1210.

[239] In states in which fault is a permissible consideration in divorce, property division, alimony, or a later suit for domestic violence may be barred. Courts have taken varying approaches to the issues, including holding that a post divorce tort suit is barred, Smith v. Smith, 530 So. 2d 1389 (Ala. 1988), that suit will be allowed, but must be listed in the divorce as a financial claim, Heacock v. Heacock, 520 N.E.2d 151 (Mass. 1988), and that suit will be allowed in the judge's discretion. Brennan v. Orban, 678 A.2d 667 (N.J. 1996). Since Mississippi retains fault-based grounds for divorce, the potential for res judicata would certainly be present in any divorce on those grounds. In addition, the Mississippi Court of Appeals recently held in *Driste v. Driste*, 97-CA-01111-COA, ¶ 8, 738 So. 2d 763, 765 (Miss. Ct. App. 1998) that fault is a factor for consideration in both alimony and equitable distribution in an irreconcilable differences divorce, so res judicata may also be a concern in no-fault divorces.

[240] Divorce settlement agreements typically include release language to the effect that the divorcing parties release each other from "any and all claims" arising out of the marriage. Attorneys should be careful not to release a potential tort claim through settlement and release provisions in a divorce agreement. A tort claim brought after a divorce was barred on the strength of a release claim which provided that "each party hereby releases and discharges" the other from all claims arising out of the marriage. Overberg v. Lusby, 727 F. Supp. 1091, 1093 (E.D. Ky. 1990).

[241] Most states have very short statutes of limitations for intentional torts. *See* MISS. CODE ANN. § 15-1-35 (1995) (one year statute for assault and battery). A few courts have held that the short statute of limitations in battery or intentional infliction of emotional distress claims may be tolled upon a showing that the victim suffered from battered women's syndrome and was unable to bring the action. *See* Mustilli v. Mustilli, 671 A.2d 650, 651 (N.J. Super. Ct. Ch. Div. 1995) (limited to women); Giovine v. Giovine, 663 A.2d 109 (N.J. Sup. Ct. App. Div. 1995). One court has even held that there is a separate tort of domestic violence, which is a continuing tort. *See* Curtis v. Firth, 850 P.2d 749 (Idaho 1993).

possibility of double recovery.[242] Mississippi has yet to address these issues in the context of spousal tort actions.

The common law marital rape exception is closely related to the notion of interspousal tort immunity. Marital rape was not a cognizable claim under the common law. The assumption was that a man could not be guilty of raping his wife, because "the wife hath given herself up in this kind unto her husband, which she cannot retract."[243] The marital rape exemption was recognized until the early 1980s when Massachusetts and New Jersey allowed prosecution of husbands who raped their estranged wives.[244] Most states now recognize marital rape as a crime, although a number of states impose limits on the action such as requiring aggravating circumstances.[245] Mississippi has abolished the marital rape exemption for forcible rape or rape accomplished by administration of drugs[246] but retains the exemption for the crime of sexual battery for spouses living together at the time of the alleged crime.[247]

Women's tort rights were also limited by traditional notions of the duties of husband and wife. The common law allowed a husband to sue third parties who interfered with his right to his wife's services. The husband's action for loss of consortium grew out of the loss of conjugal rights defined as the "society, companionship, love, affection, aid, services, support, sexual relations and the comfort of [a spouse] . . . the right to

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[242] If a domestic violence suit is brought after a divorce in which fault played a role in property division or alimony, the defendant may raise the defense of double recovery. In *McCoy v. Cooke*, 419 N.W.2d 44 (Mich. Ct. App. 1988), the wife received 70% of marital property, because her husband's abuse was the primary cause of divorce. The court held that she could still proceed with a tort suit in spite of fault-based property division, but that her ex-husband could try to show by affirmative defense that she had been partially compensated in the divorce proceeding. *McCoy*, 419 N.W.2d at 46.

[243] *See* MATTHEW HALE, 2 THE HISTORY OF PLEAS OF THE CROWN 629, *quoted in* ELLMAN, ET AL., *supra* note 6, at 175.

[244] *See* Commonwealth v. Chretian, 417 N.E. 2d 1203 (Mass. 1981) (wife had filed for divorce); Smith v. State, 426 A. 2d 38 (N.J. 1981) (wife and husband living apart).

[245] ELLMAN, ET AL., *supra* note 6, at 176 (noting that thirteen states treat spousal rape differently in some manner).

[246] *See* MISS. CODE ANN. § 97-3-65 (3) (a) (2000).

[247] MISS. CODE ANN. § 97-3-99 (2000) (defining as sexual intercourse without consent, as opposed to rape, which is forcible intercourse without consent).

live together in the same house, to eat at the same table, and to participate together in the activities, duties and responsibilities necessary to make a home."[248] Prior to 1968, Mississippi followed the common law rule that a wife did not have a cause of action for loss of consortium as a result of her husband's injury,[249] but a husband had a cause of action for negligent injuries to his wife.[250] The Mississippi Code was amended in 1968 to provide for a wife's cause of action for loss of consortium.[251]

The equalizing of support obligations, and the recognition that spousal violence can be remedied in civil suits and criminally punished are significant steps in the development of modern concepts of marriage.

VIII. Entry Into the Marriage Relationship

While marriage is a voluntary agreement between a man and a woman, it is also an agreement to assume a state-regulated status. As an institution with importance consequences for society as a whole, marriage is controlled by the state in many respects. The state determines who may marry, what formalities are required for a valid marriage, and what agreement and understanding is necessary for the marriage contract. In contrast to the complete overhaul of divorce laws, and the significant changes in rights between married persons, state regulation of the right to marry has changed very little. One contrast is notable, however. In 1950, the most controversial limitation on marriage was Mississippi's ban on interracial marriage. Today, the legality of banning same-sex marriages is one of the most hotly debated topics in family law.

The right to marry, as "the decision to enter the relationship that is the foundation of the family in our society," is a

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[248] Tribble v. Tribble, 288 So. 2d 13 (Miss. 1974).

[249] *See* Simpson v. Poindexter, 133 So. 2d 286 (Miss. 1961); Nash v. Mobile & O.R. Co., 116 So. 100 (Miss. 1928).

[250] Palmer v. Clarksdale Hospital, 57 So. 2d 476 (1952); Brahan v. Meridian Light & Ry. Co., 83 So. 467 (1919).

[251] Miss. Code Ann. § 93-3-1 (2000) ("A married woman shall have a cause of action for loss of consortium through negligent injury of her husband.").

fundamental right protected under the Constitution. State regulation that significantly interferes with the right to marry must advance "sufficiently important state interests" and be "closely tailored" to meet only those interests.[252] Applying strict scrutiny to marriage entry requirements, the U.S. Supreme Court has struck down state laws prohibiting interracial marriages[253] and barring delinquent child support payors from marriage.[254] Not all state regulations related to marriage are subject to strict scrutiny. However, reasonable regulations which do not significantly interfere with the right to marry must meet only the rational relationship test.[255] Parental consent requirements have been upheld under this test as rationally related to the legitimate state interest in preventing unstable marriages.[256]

Generally, states will recognize a marriage that was valid in the state where the marriage took place. Two exceptions apply: A state may refuse to recognize marriages that violate a significant public policy of the state. In addition, a state may deny full faith and credit to its own residents who marry in another state to evade the laws of their home state.[257]

Mississippi follows the general rule, according full faith and credit to out-of-state marriages that do not violate significant public policy.[258] Mississippi courts have extended recog-

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[252] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

[253] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[254] *Zablocki*, 434 U.S. at 390-91. Applying strict scrutiny, the Colorado high court has held that a state cannot constitutionally prohibit marriage between adopted siblings. Israel v. Allen, 577 P.2d 762, 764 (Colo. 1978) (finding prohibition does not further state interest in family harmony).

[255] *Zablocki*, 434 U.S. at 382 ("we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny").

[256] *See* Moe v. Dinkins, 669 F.2d 67, 68 (2d Cir. 1982) (stating restrictions on right of minors to marry properly tested by rational relationship, rather than strict scrutiny).

[257] Leszinske v. Poole, 798 P.2d 1049, 1054 (N.M. Ct. App. 1990). The *Leszinske* court noted that "the two exceptions are actually one" in contemporary conflicts theory. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971)); *see also* Hesington v. Hesington's Estate, 640 S.W.2d 824, 826 (Mo. App. 1982) (citing Restatement); *In re* Lenherr's Estate, 314 A.2d 255, 258 (Pa. 1974) (same).

[258] Miller v. Lucks, 36 So. 2d 140, 142 (Miss. 1948) (recognizing marriage be-

nition to common law marriages not valid under Mississippi law,[259] and to marriages between parties not eligible to marry in Mississippi.[260] No recognition will be given to a marriage incestuous under Mississippi law if the parties have attempted to evade the law by marrying in another state and returning to Mississippi.[261]

Fifty years ago, the most topical controversy surrounding state regulation of the right to marry involved interracial marriages. Section 263 of the Mississippi Constitution provided that "the marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void."[262] In 1948, the court considered whether one spouse in an interracial marriage contracted in another state could inherit her husband's property located in Mississippi. The couple lived in Mississippi in 1923, where they were indicted for unlawful cohabitation. The prosecution was dropped on the woman's agreement to leave the state. Her partner followed, and the couple married in Illinois where they remained until her death.[263] The court noted that the purpose of the statute was to prevent interracial marriage in Mississippi, and that the purpose was not thwarted since the couple never lived in Mississippi as spouses. The husband was permitted to inherit.[264] With the United States Supreme Court's 1967 decision in *Loving v. Virginia*, the Mississippi ban on interracial marriage was clearly unconstitutional.[265]

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tween Caucasian and African-American for purposes of allowing one spouse to inherit property located in Mississippi, where couple never lived in Mississippi).

[259] George v. George, 389 So. 2d 1389, 1391 (Miss. 1980) (recognizing common law marriage in Georgia).

[260] *Miller*, 36 So. 2d at 142 (recognizing marriage between Caucasian and African-American for purposes of allowing one spouse to inherit property located in Mississippi, where couple never lived in Mississippi).

[261] MISS. CODE ANN. § 93-1-3 (1994).

[262] *Miller*, 36 So. 2d at 142 (recognizing marriage between Caucasian and African-American for purposes of allowing one spouse to inherit property located in Mississippi, and where the couple never lived in Mississippi).

[263] *See Miller*, 36 So. 2d at 141.

[264] *Id.*

[265] Loving v. Virginia, 388 U.S. 1 (1967).

A look at the current debate on state regulation of marriage shows radical change in social attitudes in fifty years. The traditional definition of marriage as a union between man and woman[266] was challenged in 1993 when the Hawaii Supreme Court held in *Baehr v. Lewin* that prohibition of same-sex marriages should be tested by strict scrutiny under the Hawaii Constitution as a sex-based classification.[267] On remand, the trial court found no compelling state interest underlying the prohibition, and held that Hawaii was required to recognize same-sex marriages.[268]

In response to the *Baehr* decision, many states enacted statutes denying full faith and credit to same-sex marriages valid in other states.[269] In 1997, the Mississippi Code was amended to provide, "[a]ny marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi."[270] In addition, Congress passed the Defense of Marriage Act[271] recognizing the right of states to refuse recognition to same-sex marriages.[272] More recently,

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[266] *See* GREGORY, ET AL., *supra* note 1, § 2.04, at 35.

[267] 852 P.2d 44 (Haw. 1993).

[268] Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996). Following the *Baehr* decision, Hawaii's legislature enacted legislation explicitly prohibiting same-sex marriages. HAW. REV. STAT. § 572-1 (1998). The Hawaii Supreme Court has not ruled on whether the amended statute accords with the state constitution.

[269] *See* GREGORY, ET AL., *supra* note 1, § 2.08, at 48-49.

[270] MISS. CODE ANN. § 93-1-1 (1994). *See* Estate of Reeves v. Owen, 98-CA-00095-COA, 744 So. 2d 799 (Miss. 1999) (holding that an agreement was not void simply because it was connected to termination of a homosexual relationship; contract provided for payment of $59,000 for injuries resulting from altercation).

[271] 28 U.S.C. § 1738C (Supp. V 1999) (stating that no state required to recognize another state's laws treating relationship between persons of same sex as marriage).

[272] The validity of the Defense of Marriage Act is criticized in numerous articles. *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997). *But see* Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998) (arguing for constitutionality of Act). *See generally* Robin Cheryl Miller, Annotation, *Marriage Between Persons of Same*

the Vermont Supreme Court held that same-sex couples are constitutionally entitled to the same legal benefits as married couples, although the court did not hold that the benefits must necessarily be provided by recognizing same-sex marriages.[273] In response to these decisions, both the Hawaii and Vermont legislatures enacted domestic partnership statutes extending some of the benefits of marriage to same-sex couples.[274] While Hawaii and Vermont are the only states (as of March 2002) to recognize rights of same-sex couples, numerous commentators have urged legal recognition of such unions.[275] Courts may be expected to face continued legal challenges to the exclusion of same-sex couples from marriage or some similar status, as well as challenges to states' conflicts of law rules regarding same-sex marriages.

IX. CONCLUSION

To describe the changes in family law over the last fifty years as dramatic understates the transformation that has taken place. Family law in 1950 was based on social notions that men and women were not equal, that families should remain intact except in the most extreme circumstances, and that husband and wife formed a marital unit that merged their identities. In a sense, family law has not been altered, it has been replaced. Fault-divorce has largely given way to no-fault. The title system of marital property was replaced by a system

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Sex, 81 A.L.R.5TH 1 (2000).

[273] Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

[274] HAW. REV. STAT. §§ 572C-1 to 572C-7 (2001); VT. STAT. ANN. tit. 15, §§ 1201-07 (2001). Hawaii allows same-sex couples to become reciprocal beneficiaries, with the consequent legal rights and requirements; these do not include those consequent on the marriage relationship unless the law expressly provides otherwise. HAW. REV. STAT. § 572C-6 (2001). By contrast, Vermont explicitly grants partners in a civil union "all the same benefits, protections and responsibilities . . . as are granted to spouses in a marriage." VT. STAT. ANN. tit. 15, § 1204(a).

[275] *See, e.g.*, John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999). Of course, many commentators also oppose recognizing same-sex marriages. *See, e.g.*, Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 729 (2000).

that completely disregards title. Alimony and custody, historically based entirely on gender and fault, are not gender-neutral and courts are much less concerned with fault than with economic fairness and the child's best interest. Interspousal agreements that were once void as against public policy are not encouraged and spouses are permitted to sue one another in tort. To some extent, marriage has come to resemble an economic partnership that can be dissolved at will, but with serious financial consequences.

NAVIGATING THE MAZE OF EVIDENCE OF CHARACTER AND OTHER CRIMES, WRONGS OR ACTS
Mississippi Rules of Evidence 404 & 405 in Criminal Cases

Tom R. Mason[*]

I. The Maze 838
Mississippi Rule of Evidence 404 838
Mississippi Rule of Evidence 405 839
II. Mississippi Rule of Evidence 404(a): The General Rule Excluding Character Evidence to Prove Propensity to Commit Crimes 842
A. Exceptions to Rule 404(a) 857
1. Rule 404(a)(1)—Defendant's Character in Issue; State's Rebuttal 858
a. Character in Issue by Design 859
b. Character in Issue by Accident (The Open Door) 861
c. Limits of the Open Door (Scope of the Invitation) 867
2. Rule 404(a)(2)-Victim's Character in Issue; State's Rebuttal 870
a. Victim's Character Traits Other Than for Violence 872
b. Victim's Propensity for Violence: To Prove Victim Was First Aggressor 873
c. Victim's Propensity for Violence: To Prove Defendant's Justifiable Fear or Reasonableness of Self-Defense 877
III. Mississippi Rule of Evidence 404(b): Admissibility of Other Crimes, Wrongs or Acts to Prove Other Consequential Facts 880

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[*] Professor of Law, University of Mississippi School of Law

A. Procedural Issues 881
1. Predicate for Admissibility 883
a. Elements 883
b. Burden of Proof 883
2. Judicial Duties 883
3. Sua Sponte Rule 403 Balancing (a Misnomer) 888
a. Probative versus Prejudice Balancing on Past Acts of the Accused 888
b. Probative versus Prejudice When Other Acts Were by Another Person 897
4. The Required Limiting Instruction 898
5. A Question of Admissibility or Conditional Relevancy under Rule 104? 904
6. Advance Rulings—"Chilling Effect" of Ruling or Not Ruling in Advance 905
7. Waiver of Error 908
8. Saving Error—Sustained Objections/ Admonishing Jury 912
B. Rule 404(b)-Listed Other Purposes: 916
1. Motive 916
2. Opportunity 927
3. Intent 928
a. Intent to Distribute Drugs 929
b. Intent in Non-Drug Cases 933
4. Preparation 937
5. Plan/Scheme 939
6. Knowledge 943
7. Identity 945
8. No Mistake or Accident 949
C. Mississippi Rule of Evidence 404(b): Unlisted Other Purposes: 952
1. Interrelated Events/Explain Events/Complete Story 952
2. Predisposition in Rebuttal of Entrapment Defense 971
3. Lustful Disposition Toward that Victim of a Sex Crime 976
4. Guilty Knowledge/Coverup 981

5. Volunteered Reference to Defendant's Other Crimes 985
6. Element of the Crime Charged 989
7. Conspiracy 992
8. Sentencing 994
9. Victim's State of Mind 996
10. Bias or Interest of a Witness 996

This article will attempt to pull together the many strains, and themes in the interlocking and overlapping decisions that interpret the rules governing the admissibility of evidence of character and of crimes, wrongs or acts other than the crime which is being tried. These rules must be among the most complex and troublesome evidentiary rules for trial judges and lawyers to apply. There are probably more appeals claiming error in applying these rules than for any other rules, and a relatively high percentage of reversals, based on either misapplication of the rules or procedural errors.

This article digests every case involving these rules reported in the Southern Reporter from the Mississippi appellate courts from 1986, when the rules became effective, through November 22, 2001. There are over 160 cases. Many yielded more than one holding concerning these types of evidence.

Rules 404 and 405, adapted by the drafting committee from the Uniform Rules of Evidence and the Federal Rules of Evidence, did not materially change the common law which courts had been applying previously.[1] The new rules simply pulled together the common law rules and presented them in a compact and organized, although general, form. Since the rules came into force, the court has had many opportunities to apply them and to create procedural rules designed to assure their fair application.

This article follows the organization of the rules. As each subsection is presented, there is a short commentary usually

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[1] *See* MISS. R. EVID. 404 cmt.

drawn from the cases, and then the cases are presented with short digests of the holdings involving the sub-parts of the rules. Occasionally, a note will follow the cases where some particular aspect deserves special mention. A few suggestions are made for amending the rules to increase clarity, logical consistency and ease of application.

The part of the article which can perhaps be of most help to the trial judge and lawyer is Part III dealing with Procedural Issues for applying Rule 404(b), involving proof of other crimes, wrongs or acts. The rules and concepts dealt with there are not written as part of the Rules of Evidence themselves but have been created and engrafted in common law fashion as the courts have interpreted and applied the written rules.

Unless otherwise noted, all references to "Rules" concern the Mississippi Rules of Evidence.

We begin with the Rules.

I. THE MAZE

Mississippi Rule of Evidence 404

Character Evidence Not Admissible to Prove Other Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Comment: Rule 404 is an adaptation of the pre-rule common law that governed character evidence and does not change those rules. It is identical to the federal rule in substance. The federal rule differs only in having a specific requirement that the prosecution give notice of intent to introduce evidence under section (b), allowing evidence for other purposes. Further comment is offered where specific parts of the rule are discussed below.

Mississippi Rule of Evidence 405

Methods of Proving Character

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Comment: There is little case law guidance on these forms of evidence. The most explicit case is *Newsom v. State*,[2] where it was explained that Rule 405 means that when character evidence is admissible under the 404(a) exceptions, then the form will be reputation or opinion testimony under 405(a).[3] The su-

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[2] 629 So. 2d 611 (Miss. 1993); *see infra* notes 7-12 and accompanying text.

[3] *Newsom*, 629 So. 2d at 614. *See* MISS. R. EVID. 404 cmt. (noting the only substantial change from the common law was in adding opinions as an accepted

preme court in *Newsom* ruled, however, that when the defendant offers evidence of the victim's violent character in self defense, then that character evidence becomes an essential element of the defense, and evidence of specific instances of violence by the victim is admissible under 405(b).[4] Past crimes by the defendant can be essential elements of the charge when the defendant is charged as a habitual criminal, committed a crime after a prior felony, or has made a claim of entrapment and the prosecution wishes to prove defendant's criminal predisposition.

A defendant, by testifying to his good character, does not make good character an essential element of the defense so that the State may not prove prior specific bad acts by the defendant.[5] However, offering reputation or opinion proof of the defendant's good character is rarely offered in modern practice. Only three cases decided under the Mississippi Rules of Evidence mention such character evidence.[6]

Rule 405(b) refers only to specific instances of other crimes, wrongs or acts so that when evidence is offered under that rule, it must be in the form of specific instances of conduct.

CASES:

Newsom v. State[7]

The defendant shot and killed the victim who had threatened him with a knife, and was convicted of manslaughter.[8] The trial judge excluded testimony of a defense witness to the effect that the witness had seen the victim in fights before.[9] The supreme court held this to be error because the defendant made the victim's character an essential element by injecting

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form of proof).

[4] *Newsom*, 629 So. 2d at 614.

[5] Nicholson v. State, 93-CT-01378-SCT, ¶¶ 12-38, 704 So. 2d 81, 83-88 (Miss. 1997); *see infra* notes 85-91 and accompanying text.

[6] *See* cases cited *infra* notes 202-24 and accompanying text.

[7] 629 So. 2d 611 (Miss. 1993).

[8] *Newsom*, 629 So. 2d at 612.

[9] *Id.* at 613-14.

self-defense into the case.[10] Specific acts of the victim's conduct reflecting a violent character became admissible under Rule 405(b).[11] The lower court decision was not reversed, however, because the defendant and other witnesses had testified to several instances of the victim's violent behavior; therefore, exclusion of this similar evidence was not prejudicial.[12]

Note: The supreme court went to some length to explain the rules dealing with proving a victim's character.[13] The court said that if evidence is offered under Rule 404(a)(2), then the form of it is controlled by Rule 405(a), and only opinion or reputation proof is allowed, with cross only on specific instances of conduct.[14] However, if character is an essential element of a defense then Rule 405(b) allows proof of specific instances of conduct independent of Rule 404(a)(2).[15] The supreme court cited *Heidel v. State*[16] for the proposition that when the defendant claims self-defense the victim's character becomes an essential element under Rule 405(b).[17] The rule appears to be that if the defendant can offer evidence that the victim was the first aggressor, thus raising self-defense, then evidence of the victim's character for violence is admissible in any form.

Goff v. State[18]

Goff was convicted of manslaughter for beating and kicking a small, retarded man who later died from his injuries.[19] Goff testified that he acted in self-defense when he was grabbed in a dark alley.[20] The State was permitted to have witnesses testify to the character of the victim for peaceful-

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[10] *Id.*
[11] *Id.*
[12] *Id.* at 614.
[13] *Id.* at 613.
[14] *Id.*
[15] *Id.* at 614.
[16] 587 So. 2d 835 (Miss. 1991); *see infra* notes 408-16 and accompanying text.
[17] *Newsom*, 629 So. 2d at 614 (citing *Heidel*, 587 So. 2d at 843-47).
[18] 98-KA-00723-COA, 778 So. 2d 779 (Miss. Ct. App. 2000).
[19] *Goff*, ¶¶ 1-4, 778 So. 2d at 781.
[20] *Id.* ¶ 3, 778 So. 2d at 781.

ness under Rule 404(a)(2).[21] When asked about his reputation one witness replied: "He wouldn't hurt a fly," "never really bothered anybody," and "was a kind, gentle man."[22] On appeal, Goff argued these statements were references to specific instances of conduct, not permissible under Rule 404(a)(2) for evidence offered on the character of a victim to rebut a claim of self-defense.[23] The Mississippi Court of Appeals rejected this argument.[24] The court of appeals agreed that evidence in the form of opinion or reputation is permitted under this rule.[25] However, the court found these statements to be colloquialisms used in everyday speech and not impermissible specific instances of conduct.[26] In addition, the right to object had been waived because there had been no objection or request at trial that the jury be admonished or a limiting instruction given.[27]

II. MISSISSIPPI RULE OF EVIDENCE 404(A): THE GENERAL RULE EXCLUDING CHARACTER EVIDENCE TO PROVE PROPENSITY TO COMMIT CRIMES

Rule 404(a) follows the common law which recognized that a jury, hearing that the defendant had done other bad acts, would quickly convict the defendant because he or she is a bad person, although the evidence of the present crime charged might be weak. Such evidence is regarded as extremely prejudicial, risking a verdict based on factors other than an objective evaluation of the evidence.[28]

Where the probative force of the evidence is marginal or lacking with regard to some legitimate issue in dispute, and appears to be primarily to show the defendant as a bad person who deserves to be convicted, the appellate courts have been quick to reverse. Reversal has occurred in about 10% of the

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[21] *Id.* ¶ 22, 778 So. 2d at 785.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *See* MISS. R. EVID. 404 cmt.

cases because there was no legitimate disputed issue on which the evidence was probative. These cases held the evidence inadmissible under this general rule.

CASES:

Edlin v. State[29]

Edlin was convicted of murdering his ex-girlfriend's current boyfriend.[30] The State was permitted to show that sometime before the murder, Edlin, in a fit of rage, had rammed his jeep into the girlfriend's car and had also knocked down the door of her apartment and choked her.[31] The trial judge allowed this evidence as bearing on his motive.[32] The supreme court reversed reasoning that the State could prove that the girl had broken up with him, and that he was jealous.[33] However, proving the acts of violence toward her primarily proved his violent nature and that he would act in conformity with that nature; admitting this evidence would violate Rule 404(b).[34]

Darby v. State[35]

Darby, claiming self-defense, was convicted of aggravated assault in a shooting.[36] Darby wanted to testify that he knew the victim was involved in a food stamp scam, and that the victim knew Darby was a police informer.[37] He also wished to show that the victim had once before shot between Darby's legs, had threatened Darby, and had a gun in his possession when this shooting occurred.[38] Without stating reasons, the

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[29] 533 So. 2d 403 (Miss. 1988); *see infra* notes 459-63 and accompanying text for a discussion of another evidentiary issue of this case.

[30] *Edlin*, 533 So. 2d at 404.

[31] *Id.*

[32] *Id.* at 408.

[33] *Id.*

[34] *Id.*

[35] 538 So. 2d 1168 (Miss. 1989); *see infra* notes 464-68, 629-38 and accompanying text for a discussion of other evidentiary issues of this case.

[36] *Darby*, 538 So. 2d at 1170.

[37] *Id.* at 1171.

[38] *Id.*

trial judge ruled before trial that if Darby brought up the matter of being an informer, the State could then go into Darby's prior criminal behavior.[39] Apparently, the judge thought that showing that Darby was an informer put Darby's character into issue, exposing him to cross on his prior unconvicted crimes. Thus "chilled," Darby did not testify to being an informer or of the victim's knowledge that he was an informer, all of which would have supported his self-defense claim of justifiable fear of the victim.[40] Darby claimed that he was denied his due process right to present his defense, and the supreme court agreed.[41] The court relied on Rule 404(b) in holding the trial judge erred by ruling Darby's prior criminal behavior was admissible, thereby depriving him of the due process right to present evidence in his own defense.[42]

Blanks v. State[43]

Blanks, a teenager, was charged with murder and convicted of manslaughter in the shooting death of his friend.[44] Blanks claimed that the gun accidently fired while Blanks was showing the friend how it worked.[45] On direct, Blanks said that he had never fired the gun, had not been instructed in its use and wasn't supposed to handle it.[46] The trial court permitted the State to cross him about a previous incident in which he had waived a pistol around and threatened to shoot another friend.[47] The supreme court reversed over the State's argument that the State's questioning was proper impeachment of the direct testimony.[48] The court simply applied Rule 404(b) and held that the State cannot try to prove commission of the charged crime by showing other similar incidents; "the most the State should have been permitted to ask him was

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[39] *Id.* at 1172.
[40] *Id.*
[41] *Id.* at 1173-74.
[42] *Id.* at 1172-73.
[43] 547 So. 2d 29 (Miss. 1989).
[44] *Blanks*, 547 So. 2d at 32-33.
[45] *Id.* at 32.
[46] *Id.* at 32-33.
[47] *Id.* at 34-36.
[48] *Id.* at 37.

whether or not on a previous occasion he had handled the weapon."[49]

Rose v. State[50]

In a trial for conspiracy to commit grand larceny, the State was allowed to cross the defendant about the arson of her house.[51] Her conviction was reversed by the supreme court because her character was not in issue and because the implied arson was not connected with the charged crime in any way.[52]

Spraggins v. State[53]

Spraggins was convicted of selling cocaine to a confidential informant.[54] In his direct testimony, Spraggins denied selling the cocaine and said nothing which would have opened the door to his character or past conduct.[55] The trial court permitted the prosecutor to cross him about other sales, an arrest and conviction in Memphis of possession with intent, the fact that his live-in girlfriend used cocaine, and his supplying cocaine to another woman.[56] The supreme court reversed the trial court's decision to allow this cross-examination.[57] The supreme court held that the door to such evidence can only be opened by the defendant on direct by testifying to some claim of good character, or by testifying to a clear record which can then be rebutted by the State.[58] The door may not be opened in the cross of the defendant by the State.[59] Rule 404(b) clearly excluded all the subjects of the cross-examination.[60]

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[49] *Id.*
[50] 556 So. 2d 728 (Miss. 1990).
[51] *Rose*, 556 So. 2d at 730-31.
[52] *Id.* at 731.
[53] 606 So. 2d 592 (Miss. 1992).
[54] *Spraggins*, 606 So. 2d at 592.
[55] *Id.* at 593.
[56] *Id.* at 594-96.
[57] *Id.* at 598.
[58] *Id.* at 597-98.
[59] *Id.*
[60] *Id.*

Hewlett v. State[61]

Three people died when Hewlett, while drunk, crashed into the rear of their car.[62] He was convicted of three counts of manslaughter.[63] The trial court permitted an officer to testify that the truck Hewlett was driving did not have a valid inspection sticker and that he did not have a valid driver's license.[64] The supreme court found it to be error to admit evidence of other criminal offenses unrelated to the charged crimes.[65] However, the error was harmless and not reversible.[66]

Watts v. State[67]

Watts was convicted of attempted burglary of a store.[68] The trial court allowed the arresting officers to testify that they found a credit card and some silver coins on Watts which Watts had stolen in another burglary the night before.[69] The supreme court reversed.[70] The supreme court rejected the State's argument that the evidence was admissible to show intent, plan, and ability to commit the charged burglary, as well as an entire series of interrelated events.[71] The court reasoned that while there may have been some slight point of relevancy, the evidence mostly supported an inference that Watts committed the charged crime merely because he was that type of person.[72] The trial judge was chastised for failing to identify the specific point of relevance the evidence was admitted under and for failing to conduct an on the record Rule 403 balancing before admitting the evidence.[73]

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[61] 607 So. 2d 1097 (Miss. 1992).
[62] *Hewlett*, 607 So. 2d at 1099.
[63] *Id.*
[64] *Id.* at 1103.
[65] *Id.*
[66] *Id.*
[67] 635 So. 2d 1364 (Miss. 1994).
[68] *Watts*, 635 So. 2d at 1364.
[69] *Id.* at 1365.
[70] *Id.* at 1369.
[71] *Id.* at 1366.
[72] *Id.* at 1368-69.
[73] *Id.*

Lester v. State[74]

Lester was convicted in Hinds County of the capital murder of his one-year-old daughter.[75] The facts showed that about four months before the baby's death, the baby had a cut lip.[76] Three months before her death, she had a spiral fracture of her leg.[77] On the night of her death, she was found to have multiple bruises from blows to her back and stomach, internal injuries with bleeding (the cause of death), and massive (mortal) injuries to her head.[78] The autopsy revealed that her anus and vagina were enlarged from multiple penetrations; these injuries had healed, but were estimated to be two to three weeks old.[79]

The supreme court observed that under Rule 104(b) when bad acts are admissible they must be accompanied by evidence sufficient to support a finding that the defendant actually did the acts.[80] The supreme court found that the trial court's admission of the sexual abuse of the baby without proof that Lester committed the acts was error.[81]

The State had also been allowed to show that Lester had hit and kicked the live-in mother of the baby when she was pregnant.[82] The supreme court found error here as well.[83] Such evidence merely portrayed the defendant as a violent man.[84]

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[74] 692 So. 2d 755 (Miss. 1997); *see infra* notes 232-35, 482-84, 803-05, 1142-45 and accompanying text for a discussion of other evidentiary issues of this case.

[75] *Lester*, 692 So. 2d at 765.

[76] *Id.* at 767.

[77] *Id.*

[78] *Id.* at 768-69.

[79] *Id.* at 769.

[80] *Id.* at 778.

[81] *Id.* at 782-83.

[82] *Id.* at 784.

[83] *Id.*

[84] *Id.*

Nicholson v. State[85]

The defendant, a coach of a girl's softball team, was convicted of sexual battery of an eleven-year-old team member.[86] On direct, Nicholson volunteered: "I've never done anything wrong to any child."[87] The trial court then permitted the State to cross him about his fondling of another girl on the team and to put that girl on the stand to prove the alleged fondling.[88] The supreme court reversed.[89] The State argued that Nicholson placed his character in issue, which permitted the State to rebut his evidence supporting an inference that he would not commit such a crime.[90] However, the supreme court held that Nicholson's character was not an essential element of the charge or defense, therefore, evidence of a specific instance of conduct, the other fondling, was not admissible under Rule 405(b).[91]

Note: The supreme court was hard-pressed here to distinguish an earlier case, *Rowe v. State*,[92] in which the defendant testified on re-direct that he would not hurt anyone to get money.[93] The supreme court held that the State was properly permitted to prove the defendant's prior conviction for armed robbery.[94] The supreme court attempted to distinguish *Rowe* by noting that in *Rowe*, the proof was of a conviction, permitted under Rule 609.[95] However, the evidence in *Rowe* was not offered to impeach under Rule 609, but rather to rebut the defendant's claim of good character under Rule 404(a).[96] The proof of the conviction was just one way to prove the prior

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[85] 93-CT-01378-SCT, 704 So. 2d 81 (Miss. 1997); *see infra* notes 1149-52 and accompanying text for a discussion of another evidentiary issue of this case.

[86] *Nicholson*, ¶ 1, 704 So. 2d at 81.

[87] *Id.* ¶ 8, 704 So. 2d at 82.

[88] *Id.* ¶ 13, 704 So. 2d at 83.

[89] *Id.* ¶ 38, 704 So. 2d at 88.

[90] *Id.* ¶¶ 18-23, 704 So. 2d at 84-85.

[91] *Id.* ¶ 36, 704 So. 2d at 87-88.

[92] 562 So. 2d 121 (Miss. 1990); *see infra* notes 202-08 and accompanying text.

[93] *Rowe*, 562 So. 2d at 322.

[94] *Id.*

[95] *Nicholson*, ¶ 36, 704 So. 2d at 87-88; *see infra* notes 1149-52 and accompanying text for a discussion of another evidentiary issue of this case.

[96] *Id.* ¶¶ 18-23, 704 So. 2d at 84-85.

specific conduct, which the court in *Nicholson* says is not admissible to rebut Rule 404(a) character evidence.[97] The testimony in *Rowe* was but another way to prove the prior specific conduct. The cases seem indistinguishable.

Watts v. State[98]

Watts was convicted of murder and armed robbery.[99] He shot his employer, took his employer's billfold, gun and pickup truck, and then later turned himself in, claiming the shooting was an accident.[100] He moved unsuccessfully *in limine* to exclude evidence that sometime after the crime he used some of the money he took to buy crack.[101] The supreme court reviewed cases holding that such evidence may be admissible when connected to showing motive for a killing or robbery, but here there was no such connecting evidence.[102] The supreme court ruled that is was error to admit the evidence of the drug crime, but the error was harmless in view of the overwhelming evidence of defendant's guilt.[103]

Banks v. State[104]

In this conviction for capital murder, the State's witness was allowed to testify that the day before the murder he heard Banks say that he (Banks) was a dangerous man who loved money and would do anything for it.[105] The trial judge allowed the testimony to prove Banks's state of mind under Rule 404(a).[106] Banks objected that this was improper character evidence.[107] The supreme court reversed.[108] The supreme court observed that the apparent purpose of the evi-

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[97] *Id.* ¶ 36, 704 So. 2d at 87-88.
[98] 95-KA-00983-SCT, 717 So. 2d 314 (Miss. 1998).
[99] *Watts*, ¶ 1, 717 So. 2d at 315.
[100] *Id.* ¶¶ 2-3, 717 So. 2d at 315-16.
[101] *Id.* ¶ 20, 717 So. 2d at 322.
[102] *Id.* ¶¶ 21-22, 717 So. 2d at 322-23.
[103] *Id.* ¶¶ 23-24, 717 So. 2d at 323.
[104] 95-KA-00215-SCT, 725 So. 2d 711 (Miss. 1997).
[105] *Banks*, ¶ 24, 725 So. 2d at 717.
[106] *Id.*
[107] *Id.*
[108] *Id.* ¶ 26, 725 So. 2d at 718.

dence was to prove that Banks acted in conformity with his character.[109] The court noted that Banks's statement was not evidence of a specific crime, wrong or act allowed under Rule 404(b).[110] The most that could be said was that Banks's statement was an admission of a trait consistent with motive.[111] The trial judge had abused his discretion in allowing in this.[112]

Note: In *Banks*, the State's attempt to offer character evidence in the form of the defendant's opinion of himself was covered by Rule 404(a). The State cannot introduce such evidence until the defendant places his character in issue with proof of good character.

Burrell v. State[113]

Burrell appealed from his conviction for selling drugs to an undercover agent.[114] The trial judge had carefully considered arguments and made a Rule 403 analysis before deciding to allow the State to prove that Burrell had made prior sales of drugs to the State's witness.[115] The "other purpose" for which the evidence was admitted was to prove identity.[116] The witness testified he knew Burrell from having bought drugs from him a number of times before.[117] The court of appeals reversed.[118] The appellate court noted that the identification by that witness could have been done without referring to prior drug sales.[119] Therefore, the appellate court concluded that the force of the evidence was to show Burrell's propensity to sell drugs.[120]

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[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] 97-KP-00404-COA, 727 So. 2d 761 (Miss. Ct. App. 1998).
[114] *Burrell*, ¶ 1, 727 So. 2d at 763.
[115] *Id.* ¶¶ 14-17, 727 So. 2d at 767-68.
[116] *Id.*
[117] *Id.*
[118] *Id.* ¶ 19, 727 So. 2d at 768.
[119] *Id.*
[120] *Id.*

Kelly v. State[121]

Kelly was convicted of three counts of manslaughter, apparently having pushed his wife and two children into a flooded creek, drowning them.[122] Before the trial, the judge had ruled that the prosecution could not introduce evidence of prior bad acts of the defendant where he had physically and verbally abused his wife and family.[123] When the prosecutor began her cross of Kelly, she immediately hinted at the abuse issue obliquely, asking him why he went to the domestic abuse shelter looking for them.[124] Then, over continuing objections, she asked him about instances of threats and abuse of his wife and children.[125] The trial judge appeared to give up trying to control the prosecutor, finally saying in response to an objection that the questioning was allowed because it was a murder trial.[126]

On appeal, the State argued that Kelly had put his character in issue under Rule 404(a) by saying on direct that the last time he saw his family, he kissed his wife goodbye.[127] The court of appeals rejected the State's contention that Kelly's statement opened the door to character evidence.[128] The appellate court observed also that the prosecutor attempted to open the door for impeaching evidence by getting Kelly to say he loved his wife and children.[129] The door for impeaching evidence cannot be opened by the cross-examiner.[130] The appellate court held that the cross had no purpose other than to show Kelly's violent character and his propensity for violence toward his family.[131] Such cross was clearly prohibited by Rule 404(a).[132] The court also observed

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[121] 98-CP-00177-COA, 735 So. 2d 1071 (Miss. Ct. App. 1999).
[122] *Kelly*, ¶¶ 7-8, 735 So. 2d at 1074-75.
[123] *Id.* ¶ 35, 735 So. 2d at 1082.
[124] *Id.* ¶ 38, 735 So. 2d at 1083.
[125] *Id.* ¶ 39, 735 So. 2d at 1084.
[126] *Id.*
[127] *Id.* ¶ 44, 735 So. 2d at 1086.
[128] *Id.*
[129] *Id.* ¶ 38, 735 So. 2d at 1083.
[130] *Id.* ¶ 44, 735 So. 2d at 1086.
[131] *Id.* ¶ 40, 735 So. 2d at 1085.
[132] *Id.* ¶ 47, 735 So. 2d at 1087.

that Rule 404(b) prohibited this type of evidence and that the trial judge had failed to conduct a Rule 403 balancing as required if the judge had found that the evidence was relevant for some other purpose under Rule 404(b).[133]

Jasper v. State[134]

Jasper was convicted of grand larceny, having stolen a truck with a load of new furniture.[135] For its last question on cross, the State was permitted to ask Jasper if he had ever been convicted of a felony, to which Jasper responded affirmatively.[136] The supreme court reversed.[137] The supreme court observed that the State had failed to identify any issue on which evidence of a prior felony conviction was relevant, and that the trial judge had failed to conduct a Rule 403 balancing or give a limiting instruction.[138] The vagueness of the evidence permitted the jury's imagination to run rampant about the nature of the crime for which Jasper had been convicted.[139]

Campbell v. State[140]

Campbell was convicted of selling cocaine.[141] On several occasions during the State's case, officers made reference to other buys made from Campbell and to other charges against him.[142] On some occasions, the trial judge instructed the jury to disregard those references.[143] The court of appeals reversed.[144] The trial court had failed to defer to Rule 404(b), that evidence of other crimes or misconduct is not admissible, but instead relied on the general rule that a defendant is to be

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[133] *Id.* ¶ 46, 735 So. 2d at 1087.
[134] 1998-KA-01079-SCT, 759 So. 2d 1136 (Miss. 1999).
[135] *Jasper*, ¶ 1, 759 So. 2d at 1137.
[136] *Id.* ¶ 26, 759 So. 2d at 1141.
[137] *Id.* ¶ 29, 759 So. 2d at 1142.
[138] *Id.* ¶¶ 27-28, 759 So. 2d at 1142.
[139] *Id.* ¶ 27, 759 So. 2d at 1142.
[140] 98-KA-00065-COA, 750 So. 2d 1280 (Miss. Ct. App. 1999).
[141] *Campbell*, ¶ 1, 750 So. 2d at 1281.
[142] *Id.* ¶ 4, 750 So. 2d at 1281.
[143] *Id.*
[144] *Id.* ¶ 15, 750 So. 2d at 1284.

tried for the charges in the case against him.[145] The trial judge's admonitions to the jury were not adequate to remove the prejudice caused by the improper interjection of defendant's other crimes.[146]

Goree v. State[147]

Goree was convicted of aggravated assault.[148] The State insisted on and finally was allowed to put on evidence that Goree was a member of a street gang.[149] A detective expert described the nature of that gang, including its history of violence.[150] The court of appeals reversed the trial court's decision to allow the evidence.[151] The appellate court found that the State had offered no evidence linking gang membership to this alleged assault.[152] The State had not shown the victim was in a rival gang, and therefore, the evidence of gang membership did not establish motive.[153] The evidence was prejudicial and had no probative value on any disputed issue in the case.[154] The testimony merely proved that Goree was a bad person.[155]

McCullough v. State[156]

McCullough was convicted of aggravated assault after shooting the victim in the leg.[157] McCullough claimed self-defense.[158] McCullough moved *in limine* to exclude evidence that some years before, when he was fourteen or fifteen, he had shot another man.[159] The trial judge overruled the mo-

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[145] *Id.* ¶ 11, 750 So. 2d at 1283.
[146] *Id.* ¶ 13, 750 So. 2d at 1283.
[147] 98-KA-00314-COA, 748 So. 2d 829 (Miss. Ct. App. 1999).
[148] *Goree*, ¶¶ 1, 3, 748 So. 2d at 830.
[149] *Id.* ¶ 5, 748 So. 2d at 831.
[150] *Id.* ¶ 9, 748 So. 2d at 835.
[151] *Id.* ¶ 20, 748 So. 2d at 838.
[152] *Id.* ¶ 16, 748 So. 2d at 837.
[153] *Id.* ¶ 17, 748 So. 2d at 837-38.
[154] *Id.* ¶ 19, 748 So. 2d at 838.
[155] *Id.* ¶ 15, 748 So. 2d at 837.
[156] 98-KA-00364-SCT, 750 So. 2d 1212 (Miss. 1999).
[157] *McCullough*, ¶¶ 1-2, 750 So. 2d at 1213.
[158] *Id.* ¶ 3, 750 So. 2d at 1214.
[159] *Id.* ¶ 6, 750 So. 2d at 1214.

tion, stating that if McCullough testified McCullough would place his character in issue, and the evidence of the prior shooting would be admissible under Rule 404(b).[160] During the trial, McCullough's counsel again raised the issue and the judge repeated that if McCullough testified the evidence would be admissible.[161] McCullough's counsel then told the court that, although he disagreed with the judge and objected to the ruling, he would have McCullough testify about the previous shooting in order to reduce the impact of the evidence.[162] McCullough testified and admitted to the earlier shooting.[163] The supreme court reversed the trial court's rulings.[164] The court noted that usually a defendant cannot complain on appeal about evidence which the defendant introduced.[165] However, in this case, the record clearly revealed that the trial judge forced that strategic decision on the defense.[166] The supreme court observed that the trial judge had neglected to perform a Rule 403 balancing analysis and that the evidence was not probative of any other purpose under Rule 404(b).[167] The evidence had only prejudicial effect, requiring reversal.[168]

Ainsworth v. State[169]

The victim had lived with Judi Ainsworth and her son Nolan Ainsworth for years.[170] During an episode in which the victim abused Ms. Ainsworth, Nolan Ainsworth got a shotgun, pointed it at the victim and told him to leave.[171] The gun went off, killing the victim.[172] Ainsworth was charged

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[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.* ¶ 16, 750 So. 2d at 1217.
[165] *Id.* ¶ 9, 750 So. 2d at 1215.
[166] *Id.*
[167] *Id.* ¶ 16, 750 So. 2d at 1216-17.
[168] *Id.*
[169] 98-KA-00601-COA, 756 So. 2d 826 (Miss. Ct. App. 2000).
[170] *Ainsworth*, ¶ 3, 756 So. 2d at 827.
[171] *Id.* ¶ 6, 756 So. 2d at 827.
[172] *Id.*

with murder but convicted of manslaughter.[173] Ainsworth claimed he shot accidentally because his trigger-hand was in a surgical brace.[174] The trial judge allowed in a lab report showing that a urine sample taken from Ainsworth the day after the shooting was positive for marijuana.[175] The court of appeals reversed.[176] The State argued that the evidence of illegal drug use was relevant as an interrelated event, as part of a single transaction or occurrence involving the shooting.[177] The appellate court held that such evidence can be interrelated as part of the crime being tried only when the main transaction cannot be proven without showing the other offenses.[178] The urine test and report involved a completely separate and unrelated offense and could only improperly show the defendant's character, contrary to Rule 404(b).[179]

Flowers v. State[180]

Flowers was convicted of capital murder and sentenced to death.[181] The murder occurred during a robbery of a furniture store in which Bertha Tardy and three others were shot to death.[182] The State sought separate indictments for each murder and set Tardy's murder for trial.[183] The defendant unsuccessfully moved to try the cases together, losing a motion *in limine* to exclude the evidence of the other murders in his trial for the murder of Tardy.[184] The State introduced photos of the other victims' bodies and the autopsy reports.[185] The prosecutor made repeated references to the

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[173] *Id.* ¶ 1, 756 So. 2d at 826.
[174] *Id.* ¶ 6, 756 So. 2d at 827.
[175] *Id.* ¶ 7, 756 So. 2d at 827-28.
[176] *Id.* ¶ 7, 756 So. 2d at 828.
[177] *Id.* ¶ 9, 756 So. 2d at 828.
[178] *Id.* ¶ 12, 756 So. 2d at 829.
[179] *Id.* ¶¶ 11, 13, 756 So. 2d at 829.
[180] 97-DP-01459-SCT, 773 So. 2d 309 (Miss. 2000).
[181] *Flowers*, ¶ 3, 773 So. 2d at 312.
[182] *Id.* ¶¶ 2, 4, 773 So. 2d at 312-13.
[183] *Id.* ¶ 5, 773 So. 2d at 313.
[184] *Id.* ¶ 48, 773 So. 2d at 324.
[185] *Id.* ¶ 33, 773 So. 2d at 320.

four murders in his opening and closing statements.[186] The trial judge failed to conduct a Rule 403 balancing for any of the evidence.[187] Flowers argued that this evidence violated Rule 404(b) and was unfairly prejudicial.[188] The supreme court agreed and reversed.[189] The supreme court recognized that Rule 404(b) permits evidence of interrelated events and facts when necessary to show the complete story and present a coherent case to the jury.[190] Some of this evidence might have been admissible for that purpose, however, much of it was not necessary and was obviously introduced by the prosecutor to inflame the jury.[191] The supreme court found error in the penalty phase also because the prosecutor had crossed Flowers's mother about Flowers shooting another boy when he was fifteen, but had then failed to offer any evidence of that crime after the defendant's mother denied it.[192]

McKee v. State[193]

After McKee stole a woman's purse in a parking lot, he was arrested and eventually confessed to the crime.[194] In confessing, McKee told a detective that he needed help for his cocaine addiction.[195] At the trial, the detective testified to McKee's cocaine addiction.[196] The trial judge overruled the defense's objection to the introduction of this evidence and motion for mistrial.[197] The trial judge failed to perform a Rule 403 balancing and did not give a limiting instruction to the jury.[198] The supreme court held the trial judge's action to be harmless error.[199] The evidence was inadmissible because

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[186] *Id.* ¶ 35, 773 So. 2d at 321.
[187] *Id.* ¶ 50, 773 So. 2d at 324.
[188] *Id.* ¶ 23, 773 So. 2d at 318.
[189] *Id.* ¶ 53, 773 So. 2d at 325.
[190] *Id.* ¶ 46, 773 So. 2d at 323.
[191] *Id.* ¶ 35, 773 So. 2d at 321.
[192] *Id.* ¶ 67, 773 So. 2d at 330.
[193] 1999-KA-00676-SCT, 791 So. 2d 804 (Miss. 2001).
[194] *McKee*, ¶¶ 2, 4, 791 So. 2d at 805-06.
[195] *Id.* ¶ 4, 791 So. 2d at 806.
[196] *Id.* ¶ 23, 791 So. 2d at 810.
[197] *Id.*
[198] *Id.*
[199] *Id.*

there was no identified issue on which the evidence of addiction might be relevant, but there was overwhelming proof of McKee's guilt.[200] Also, the evidence of drug use was so different from the robbery charge that there was little chance of unfair prejudice.[201]

A. Exceptions to Rule 404(a)

The subparts of Rule 404(a) are true exceptions to the rule. Character evidence admitted under these exceptions may show that a person acted in conformity with his or her past conduct. Such evidence is not offered to support an inference on some other issue in dispute such as motive or plan, as allowed by Rule 404(b).

The Mississippi Supreme Court would be wise to add three more exceptions to Rule 404(a): Evidence of 1) past sales of drugs, 2) past sexual misconduct toward a victim, and 3) past misconduct of the defendant to rebut a defense of entrapment. These are all, in reality, offered to prove that the defendant acted in conformity with his past conduct. These are true exceptions to the general rule excluding such evidence arising in Mississippi caselaw and are explained in more detail below.

1) *Past sales of drugs admitted to prove intent to distribute drugs for a possession with intent charge.* The past sale evidence is clearly offered to show that defendant's intent in possessing the drugs in the present case was in conformity with his intent when he sold drugs on the previous occasion. The illogic of the limiting instruction given to the jury proves this point. The jury is told that they may consider the evidence of the past sales in deciding if the defendant intended to distribute the drugs in his possession, but may not consider the past sales in deciding if the defendant committed the crime of possession with the intent to distribute.

2) *Past sexual misconduct toward the victim admissible to prove that the defendant had a lustful disposition toward the victim.* From this, the logical inference is that the defendant

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[200] *Id.* ¶ 24, 791 So. 2d at 811.
[201] *Id.* ¶ 25, 791 So. 2d at 811.

committed the crime against the victim this time. This is nothing more than proving that the defendant acted in conformity with his lustful disposition, his character, proven by those past acts. None of the cases mention a limiting instruction in the context of this type of evidence, probably because one is not possible since the evidence is given to prove conformity with past conduct.

3) *Past conduct of the defendant admissible to prove his or her predisposition to commit a type of crime when used in rebuttal for an entrapment defense.* When the defendant shows *prima facie* proof of entrapment, it then becomes the burden of the State to prove the defendant's predisposition to commit that kind of crime. This is nothing more than requiring a showing that the defendant has the character (predisposition/propensity) to commit that type of crime. The jury will logically conclude that the defendant intended to commit the crime again this time–a result prohibited by Rule 404(a).

It is suggested that Rule 404(a) should be amended to add these three types of evidence to the list of exceptions because that is what they truly are. Logical consistency would require their proper identification as exceptions under Rule 404(a), not their false inclusion as "other purposes" under Rule 404(b).

This article will not discuss the Rule 404(a)(3) exception dealing with the admissibility of character evidence of a witness for purposes of impeachment.

1. Rule 404(a)(1)—Defendant's Character in Issue; State's Rebuttal

This is the common law "mercy rule" under which the defendant is permitted to show his good character and argue that he, a person of good character, would not and did not commit the crime charged. The State is then allowed to present rebutting evidence showing bad character supporting the inference that the defendant would and did commit the crime.

The character of the accused may be shown under Rule 405 through reputation or opinion evidence, either testified to by the defendant or by a person who knows the defendant and

his reputation. Specific instances of conduct are not admissible on direct to show character, but a character witness or defendant who asserts the defendant's good character may be crossed about specific instances of conduct which are pertinent to the character trait in issue in order to impeach the proof of good character. Extrinsic evidence of other bad acts is not admissible—the cross-examiner must take the answer of the witness.

a. Character in Issue By Design

Only in rare cases do defense attorneys consciously decide to ask a question which places the defendant's character in issue. The obvious reason is that doing so opens the defendant's prior record for rebuttal evidence showing bad character and cross on specific instances of bad conduct to impeach the character witness.

CASES:

Rowe v. State[202]

Rowe was convicted for the armed robbery of a woman in her apartment.[203] He got a total of $1.25 from her.[204] At the trial, Rowe's attorney asked Rowe if he would hurt anybody to get money and he replied "no sir."[205] The trial judge then allowed the State to cross Rowe about his prior armed robbery conviction.[206] The supreme court affirmed.[207] After Rowe put his character into issue, the State was entitled to rebut his evidence.[208]

Miller v. State[209]

Miller was convicted of manslaughter by hitting the vic-

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[202] 562 So. 2d 121 (Miss. 1990)
[203] *Rowe*, 562 So. 2d at 122.
[204] *Id.*
[205] *Id.* at 123.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] 97-KA-00072-COA, 733 So. 2d 846 (Miss. Ct. App. 1998).

tim on the back of the neck during a fight.[210] Miller claimed self-defense.[211] Miller apparently gave a statement to the police that he had been in other fights before.[212] His lawyer moved *in limine* to exclude this evidence.[213] The trial judge ruled that if Miller placed his character into issue in the trial, the State could get into his past altercations to rebut his claim of peaceful character.[214] Before reversing on other grounds, the court of appeals observed that the ruling about prior acts of the defendant was proper.[215] The other fights would have been relevant if the defendant placed his character in issue with evidence of his peaceful character.[216] Rule 405(a), therefore, permits cross on specific acts when the defendant puts his character into issue.

Morgan v. State[217]

Morgan was indicted and found guilty of conspiracy and fraud in a case in which numerous attorneys, businessmen, and even a chancellor bled the conservatorship of an incapacitated, wealthy Picayune businessman.[218] Morgan was a Hattiesburg police officer who succeeded to the position of conservator after previously being head of security for the conservatorship.[219] On direct, Morgan placed his character in issue by saying that he had received decorations as an officer and that his integrity had never been questioned.[220] On cross, the State was allowed to show that he had been charged with police brutality apparently more than once.[221] The supreme court affirmed the evidentiary ruling, but the case was re-

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[210] *Miller*, ¶ 2, 733 So. 2d at 848.
[211] *Id.* ¶ 3, 733 So. 2d at 848.
[212] *Id.* ¶ 17, 733 So. 2d at 851.
[213] *Id.* ¶ 17, 733 So. 2d at 852.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] 98-KA-00251-SCT, 741 So. 2d 246 (Miss. 1999).
[218] *Morgan*, ¶ 1, 741 So. 2d at 249.
[219] *Id.* ¶¶ 3-4, 741 So. 2d at 250.
[220] *Id.* ¶ 22, 741 So. 2d at 254-55.
[221] *Id.* ¶ 19, 741 So. 2d at 254.

versed on other grounds.[222] The defendant placed his character in issue in direct and under Rule 404(a)(1), the State was entitled to offer contradicting evidence.[223]

Note: Morgan placed his character in issue for the trait of integrity, pertinent in this fraud case.[224] The cross concerning police brutality was not relevant to that character trait and should have been ruled inadmissible. In addition, those charges, unsupported by evidence of the truth of the charges, were weak evidence that Morgan actually engaged in police brutality. Stronger evidence of the prior bad act should have been shown to be available before allowing cross on claimed misconduct.

b. Character in Issue By Accident (The Open Door)

Often, the character of the defendant is put in issue by the defendant or some other witness making a statement on direct which injects the defendant's character into the case. From the defense lawyer's viewpoint, the introduction of the defendant's character is an accident and a mistake. Such a volunteered assertion of good character "opens the door" to contradicting proof of bad acts by the defendant. If the statement is that the defendant has not or would not commit some specific act, the prosecution is allowed to cross about bad acts in impeaching of the witness.

CASES:

Kolb v. State[225]

Kolb, a gymnastics instructor at a YMCA, was convicted of sexual battery of a ten-year-old boy.[226] On direct, in explaining some letters he had written, Kolb testified that he

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[222] *Id.* ¶¶ 22, 44, 741 So. 2d at 254-55, 259.
[223] *Id.* ¶ 22, 741 So. 2d at 254-55.
[224] *Id.* ¶ 22, 741 So. 2d at 255.
[225] 542 So. 2d 265 (Miss. 1989)
[226] *Kolb*, 542 So. 2d at 266-67.

was not homosexual.[227] On cross, the prosecutor was allowed to ask Kolb about being homosexual.[228] The supreme court affirmed.[229] Kolb made homosexuality an issue on direct.[230] Therefore, it was proper for the prosecutor to cross him about that character trait.[231]

Lester v. State[232]

Lester was convicted in Hinds County of the capital murder of his one year old daughter.[233] The defendant's expert psychologist testified that Lester had told him that he had never been convicted of any crime.[234] This was held to have opened the door to cross of that expert about the defendant's prior grand larceny conviction.[235]

Bell v. State[236]

Bell was convicted of murdering a country store clerk during a robbery and subsequently sentenced to death.[237] In the sentencing phase, Bell put on evidence that he was not violent.[238] The State then presented two law enforcement officers who testified that Bell had a bad reputation for violence.[239] The supreme court found no error because Rule 404(a)(1) expressly permits character evidence to rebut good character evidence presented by an accused.[240]

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[227] *Id.* at 267-68.
[228] *Id.* at 270.
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] 692 So. 2d 755 (Miss. 1997).
[233] *Lester*, 692 So. 2d at 765; *see supra* notes 74-84 and accompanying text for a recitation of the facts and discussion of another evidentiary issue of this case; *infra* notes 482-84, 803-05, 1142-45 and accompanying text for a discussion of other evidentiary issues of this case.
[234] *Id.* at 780.
[235] *Id.*
[236] 93-DP-00189-SCT, 725 So. 2d 836 (Miss. 1998).
[237] *Bell*, ¶ 2, 725 So. 2d at 841.
[238] *Id.* ¶ 97, 725 So. 2d at 863.
[239] *Id.*
[240] *Id.*

Puckett v. State[241]

Puckett beat a mother of two to death with a club after first sexually abusing her with that club.[242] The victim's husband returned home just after the murder, wrestled the club away from Puckett and struck him with the club before Puckett managed to flee.[243] Puckett had worked for the victim's husband, but had recently been fired.[244] The trial court ruled that while the husband could testify that he had fired Puckett, he could not testify as to why he had fired him.[245] The husband had fired Puckett because a woman had complained to him that Puckett had frightened her by following her as she walked around her neighborhood.[246] On cross, defense counsel asked the husband whether he had previously written a favorable letter of recommendation on behalf of Puckett, and whether Puckett had displayed any hard feelings toward him upon being fired.[247] The trial court then allowed the State on re-direct to question the husband about Puckett's stalking incident which led to the firing.[248] The supreme court affirmed.[249] By bringing out the good recommendation and defendant's good attitude about the firing, the defense placed Puckett's character in issue and opened the door to rebutting proof.[250] No limiting instruction was required *sua sponte* by the trial court because the evidence was received under Rule 404(a)(1) and not for another purpose under Rule 404(b).[251]

Booker v. State[252]

Booker was convicted of murdering a man with a

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[241] 96-DP-00867-SCT, 737 So. 2d 322 (Miss. 1999).
[242] *Puckett*, ¶ 3, 737 So. 2d at 327.
[243] *Id.* ¶ 7, 737 So. 2d at 328.
[244] *Id.*
[245] *Id.* ¶ 89, 737 So. 2d at 351.
[246] *Id.* ¶ 68, 737 So. 2d at 344-45.
[247] *Id.* ¶ 90, 737 So. 2d at 351-52.
[248] *Id.*
[249] *Id.* ¶ 92, 737 So. 2d at 352.
[250] *Id.* ¶ 93, 737 So. 2d at 352.
[251] *Id.*
[252] 97-KA-00327-COA, 745 So. 2d 850 (Miss. Ct. App. 1998).

knife.[253] In discovery, Booker had asked the State to disclose any criminal record it proposed to use for impeachment.[254] The State responded "none."[255] At trial, Booker took the stand and on direct said he had not been convicted of any crimes.[256] The trial judge permitted the State to cross-examine Booker about his prior aggravated assault conviction.[257] The defense argued use of the prior conviction violated the discovery rules and should have been excluded.[258] The court of appeals affirmed the trial court's decision.[259] There was no violation of the discovery rules because the conviction was not offered to impeach pursuant to Rule 609.[260] Booker had placed his character in issue when he claimed a clean prior record on direct and the State was entitled to cross-examine him on contradicting evidence under Rule 404(a)(1).[261]

Fox v. State[262]

Fox was convicted of possession of marijuana with the intent to distribute, having been found with a quantity of bagged and loose grass.[263] Fox's brother testified that Fox would not tolerate the presence of marijuana in their mother's house.[264] On cross, the State was then allowed to ask the brother in the form of a hypothetical about a later arrest of Fox in his mother's house with a quantity of grass.[265] The supreme court held the question to be proper since the witness had raised the issue.[266] The State was thus allowed to impeach the witness with the contradicting evidence of the

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[253] *Booker*, ¶ 1, 745 So. 2d at 852.
[254] *Id.* ¶ 3, 745 So. 2d at 852.
[255] *Id.*
[256] *Id.* ¶ 4, 745 So. 2d at 852.
[257] *Id.*
[258] *Id.*
[259] *Id.* ¶ 9, 745 So. 2d at 854.
[260] *Id.* ¶¶ 7-8, 745 So. 2d at 853.
[261] *Id.* ¶ 8, 745 So. 2d at 853.
[262] 1999-KA-00186-SCT, 756 So. 2d 753 (Miss. 2000).
[263] *Fox*, ¶ 2, 756 So. 2d at 756.
[264] *Id.* ¶ 6, 756 So. 2d at 756.
[265] *Id.* ¶¶ 6, 21, 756 So. 2d at 756, 759.
[266] *Id.* ¶ 26, 756 So. 2d at 760.

defendant's other bad acts.[267]

Florence v. State[268]

Florence was convicted of sexual battery and aggravated assault.[269] Florence had forced a young man he picked up at a casino to perform homosexual acts by holding a knife to his throat.[270] The young man escaped and reported the crime.[271] Florence moved *in limine* to exclude video tapes and magazines featuring homosexual acts found at his house.[272] In its opening statement, defense counsel said the evidence provided in the trial would show that Florence was not homosexual, and that it was the young man who had in fact made homosexual advances towards Florence.[273] The trial judge ruled that the videotapes and magazines were admissible because the defendant had "opened the door" during the opening statement, placing Florence's tendency for homosexual behavior in issue.[274] This was affirmed by the supreme court.[275] Writing in terms of the general relevancy standard of Rule 401 but without referring to any other rule of evidence, the supreme court found that the evidence was more probative of Florence's tendencies than prejudicial.[276] Thus, Florence had invited the rebuttal to his claim that he was not homosexual by putting that character trait in issue.[277]

Rowlett v. State[278]

Rowlett was convicted of the lustful touching of a child under fourteen years of age, his step-daughter.[279] The inci-

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[267] *Id.* ¶ 25, 756 So. 2d at 760.
[268] 1998-KA-01394-SCT, 755 So. 2d 1065 (Miss. 2000).
[269] *Florence*, ¶ 1, 755 So. 2d at 1067.
[270] *Id.* ¶¶ 4, 7, 755 So. 2d at 1067-68.
[271] *Id.* ¶¶ 7-8, 755 So. 2d at 1069.
[272] *Id.* ¶ 14, 755 So. 2d at 1070.
[273] *Id.* ¶ 16, 755 So. 2d at 1071.
[274] *Id.* ¶ 17, 755 So. 2d at 1071.
[275] *Id.*
[276] *Id.* ¶ 18, 755 So. 2d at 1071.
[277] *Id.*
[278] 1999-KA-00879-COA, 791 So. 2d 319 (Miss. Ct. App. 2001).
[279] *Rowlett*, ¶ 1, 791 So. 2d at 321.

dent occurred in 1996.[280] There had been an incident in 1995, in which the child apparently complained that someone had touched her improperly.[281] After each incident the child was seen by a physician.[282] The trial court permitted the physician to testify that the child's hymen was intact when she examined her in 1995 but was torn when the physician examined her after the 1996 incident.[283] However, the trial judge specifically refused to let the doctor testify that the girl named Rowlett in connection with the earlier episode.[284]

Rowlett called his wife as a witness in his defense.[285] She testified that Rowlett did not have access to the girl, and that she had no cause to be concerned for the child's safety.[286] The State tried to show that the wife was aware of the danger Rowlett posed to her daughter since the girl had identified Rowlett as the molester in the 1995 incident.[287] The wife denied that she had any reason to suspect Rowlett posed a threat to her daughter.[288] The State was then permitted to call a social worker to testify that the physician had told the wife that the child had identified Rowlett as her molester.[289] Rowlett appealed, claiming this was improper rebuttal.[290] The court of appeals affirmed, holding that Rowlett had "opened the door" to such evidence by contending through his witness that all was well in the family.[291] The cross and rebuttal evidence were proper impeachment of Rowlett's wife.[292] The court of appeals in affect applied Rule 404(a) but made no mention of it.[293]

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[280] *Id.*
[281] *Id.* ¶ 8, 791 So. 2d at 323.
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.* ¶ 15, 791 So. 2d at 325.
[286] *Id.*
[287] *Id.* ¶ 16, 791 So. 2d at 325.
[288] *Id.*
[289] *Id.*
[290] *Id.* ¶ 17, 791 So. 2d at 325.
[291] *Id.*
[292] *Id.*
[293] *Id.*

c. Limits of the Open Door (Scope of the Invitation)

Once the door is opened to the defendant's character by some statement of the defendant or other witness, the cross-examiners will then want to explore every inflammatory detail of the defendant's past. The appellate courts have held that the opened door has limits. The rebutting evidence or cross should be limited to the specifics of what the witness said and cannot go beyond the scope of the invitation by exploring other events or greater detail than was raised in the statement which opened the door.

Another limit on the open door rule is that the State may not use past charges for which the defendant was acquitted to contradict some statement by the defendant. In *McFarland v. State*,[294] the court reversed the defendant's conviction because the State was allowed to cross-examine the defendant about a prior charge of which he had been acquitted.[295]

CASES:

Stewart v. State[296]

Stewart was convicted of selling cocaine to a confidential informant.[297] On direct, Stewart said that he had never seen a rock of cocaine before except on television.[298] The State then crossed Stewart and his mother about his possession of thirteen rocks of cocaine in the Indianola jail a few months before and his attempting to hide the rocks by putting them in his mother's dress.[299] When Stewart and his mother denied this, a policeman was called in rebuttal to prove the substance of that cross.[300] The supreme court reversed the allowance of

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[294] 97-KA-00569-SCT, 735 So. 2d 1007 (Miss. 1999); *see infra* notes 317-26 and accompanying text.

[295] *McFarland*, ¶ 14, 735 So. 2d at 1010.

[296] 596 So. 2d 851 (Miss. 1992).

[297] *Stewart*, 596 So. 2d at 852.

[298] *Id.* at 853.

[299] *Id.* at 852-53.

[300] *Id.* at 853.

this testimony.[301] The court held that Stewart opened the door to rebuttal proof that he had seen a rock of cocaine before, but not to proof of a completely separate criminal incident.[302] When the door is opened, the State's rebuttal is limited to the scope of what is said by the defendant.

Sanders v. State[303]

Sanders was convicted of the armed robbery, aggravated assault and shooting into a building, all arising from his attempted armed robbery of a victim in a restroom of a fast food restaurant.[304] Sanders moved *in limine* to exclude evidence of his prior conviction of conspiracy to commit armed robbery in the event he testified.[305] The trial judge sustained the motion and excluded that conviction.[306] Sanders testified to his version of the events at the fast food restaurant in which he admitted his presence there, but denied all the criminal acts.[307] On cross, to imply that Sanders' story was fabricated, the prosecutor asked him if he had ever told that story to anyone else.[308] Sanders replied he that he had told the story to his probation officer.[309] The prosecutor was then permitted to cross-examine him about his probation and the conviction for which he was placed on probation.[310] Objections by the defense counsel were overruled on the "open door" theory.[311] The court of appeals reversed.[312] The court of appeals reviewed cases limiting the admission of otherwise inadmissible evidence to the scope of the invitation of the "opened door."[313] The court reasoned that the prior conviction was be-

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[301] *Id.* at 854.
[302] *Id.*
[303] 1998-KA-00943-COA, 755 So. 2d 1256 (Miss. Ct. App. 2000).
[304] *Sanders*, ¶ 1, 755 So. 2d at 1256.
[305] *Id.* ¶ 3, 755 So. 2d at 1257.
[306] *Id.*
[307] *Id.* ¶ 4, 755 So. 2d at 1257.
[308] *Id.*
[309] *Id.*
[310] *Id.* ¶ 5, 755 So. 2d at 1257.
[311] *Id.*
[312] *Id.* ¶ 12, 755 So. 2d at 1259.
[313] *Id.* ¶ 7, 755 So. 2d at 1258.

yond the invitation, was not probative, and was prejudicial.[314] Sanders had only "opened the door" to whether he had told his story to his probation officer.[315] It was error to allow further inquiry into the reason for the probation and the underlying conviction which led to it.[316]

McFarland v. State[317]

McFarland was convicted of the armed robbery of a hotel.[318] In three prior charges for robbing hotels, there had been a mistrial on the first charge and an acquittal on the second.[319] The third charge was pending.[320] The trial judge granted McFarland's motion *in limine* preventing the State from proving the other charges, even to show identity by modus operandi.[321] During direct, however, McFarland stated he had never pointed a gun at anyone and had never robbed anyone.[322] Defense counsel made a second motion *in limine* which the trial judge overruled, allowing in the other crimes to impeach McFarland's testimony.[323] The supreme court reversed with little discussion, dealing only with the cross of McFarland about the robbery for which he was acquitted.[324] Observing that prejudice is greatly increased by showing a prior crime for which the defendant was acquitted, the supreme court relied on pre-rule and early-rule cases holding that a defendant could not be impeached with evidence of other crimes for which the defendant was not convicted.[325] In reversing on this ground, the court declined to consider the use of the other robbery charges which had not been finally

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[314] *Id.* ¶ 9, 755 So. 2d at 1258.
[315] *Id.*
[316] *Id.* ¶ 12, 755 So. 2d at 1259.
[317] 97-KA-00569-SCT, 735 So. 2d 1007 (Miss. 1999).
[318] *McFarland*, ¶ 4, 735 So. 2d at 1008.
[319] *Id.* ¶ 6, 735 So. 2d at 1008-09.
[320] *Id.*
[321] *Id.* ¶¶ 7-8, 735 So. 2d at 1009.
[322] *Id.* ¶ 9, 735 So. 2d at 1009.
[323] *Id.*
[324] *Id.* ¶ 14, 735 So. 2d at 1010.
[325] *Id.* ¶ 12, 735 So. 2d at 1010.

resolved.[326]

Note: It appears the supreme court has established a blanket rule that the State cannot prove other crimes of which the defendant has been acquitted. The United States Supreme Court has held that incidents resulting in a prior acquittal may be admitted, reasoning that an acquittal is not a finding of innocence but merely a failure to find guilt beyond a reasonable doubt.[327] Mississippi, like some other states, though, regards the use of an acquittal as fundamentally unfair and prejudicial and excludes that evidence.[328]

2. Rule 404(a)(2)-Victim's Character in Issue; State's Rebuttal

Rule 404(a)(2) might be called the "Unmerciful Rule" because it allows the defendant to attack the character of the victim, often when the victim is dead, in order to support some logical inference about the actions of the parties.

Usually the defendant has been charged with assault or homicide and has claimed self-defense, asserting that the victim was the first aggressor. Evidence that the victim was a violent person provides an inference which logically supports the claim that the victim was the first aggressor. Rule 404(a)(2) was designed to allow this kind of proof, limited to reputation or opinion evidence about the victim's violent character.

In *Heidel v. State*,[329] the Mississippi Supreme Court held that when the defendant claims the victim was the first aggressor the victim's character becomes an essential element of the defense and allows proof of specific instances of the victim's past violent conduct under Rule 405(b).[330] The court was probably wrong since it is not essential that the defen-

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[326] *Id.* ¶ 14, 735 So. 2d at 1010.

[327] *See, e.g.*, Dowling v. United States, 493 U.S. 342, 348-49 (1990).

[328] *See, e.g.*, State v. Wakefield, 278 N.W.2d 307, 309 (Minn. 1979); State v. Perkins, 349 So. 2d 161, 163 (Fla. 1977).

[329] 587 So. 2d 835 (Miss. 1991); *see infra* notes 408-16 and accompanying text.

[330] *Heidel*, 587 So. 2d at 843-44.

dant prove the victim's violent character in order to establish self-defense. Nonetheless, this construction of the Rule was subsequently reaffirmed in *Newsom v. State*.[331]

One nuance has emerged: the defendant must present some evidence of the victim's first aggression before evidence of the victim's violent character can become relevant. In the *Tolbert v. State*,[332] *Robinson v. State*,[333] and *Brown v. State*[334] cases, exclusion of evidence of the victim's violent character was held to be proper because there was no evidence of first aggression by the victim when the lower court ruling was made.[335]

Another issue of common law origin, one that arises in self-defense cases, is the issue of the defendant's fearful or apprehensive state of mind as it relates to the reasonableness of the defendant's reactions to the victim or the reasonableness of the force used by the defendant. While the State may not be able to disprove that the victim was the first aggressor, it can still claim that the defendant reacted to the victim unreasonably, or with excessive force. When the defendant's state of mind is in issue, evidence of specific instances of conduct, threats to the defendant, or the violent reputation of the victim which the defendant knew about, are admissible to support the defendant's claim that he acted reasonably in defending himself.

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[331] 629 So. 2d 611, 614 (Miss. 1993); *see supra* notes 7-17 and accompanying text.

[332] 511 So. 2d 1368 (Miss. 1987); *see infra* notes 354-60 and accompanying text.

[333] 566 So 2d 1240 (Miss. 1990); *see infra* notes 361-73 and accompanying text.

[334] 98-KA-00058-COA, 749 So. 2d 204 (Miss. Ct. App. 1999); *see infra* notes 385-90 and accompanying text.

[335] *Brown*, ¶ 20, 749 So. 2d at 212; *Robinson*, 566 So. 2d at 1241-42; *Tolbert*, 511 So. 2d at 1374.

a. Victim's Character Traits Other Than for Violence

CASES:

Harveston v. State[336]

Harveston was convicted of murder and sentenced to death.[337] Harveston claimed the shooting resulted from his resistance to a homosexual advance by the victim.[338] The trial judge excluded testimony of a patrolman that the victim frequented a rest stop which was often used by homosexuals.[339] The supreme court affirmed because the evidence was not credible to show that the victim was a homosexual.[340] The court commented that credible evidence of the victim's homosexuality would be admissible, but the of use of a rest stop evidence raised mere speculation.[341]

Russell v. State[342]

Russell was convicted of murdering a corrections officer and was sentenced to death.[343] The trial judge, on a motion *in limine*, excluded evidence offered by the defense showing that the victim had engaged in supplying contraband to other inmates.[344] Russell asserted that the evidence was offered not to assassinate the victim's character, but to show that the victim had a history of delivering contraband to inmates, and that the victim's failure to deliver contraband to Russell on the date of the incident enraged Russell, causing him to act in the heat of passion.[345] The supreme court affirmed, finding that while evidence of the victim's specific acts toward the defendant were admissible to show the defendant's state of

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[336] 493 So. 2d 365 (Miss. 1986).
[337] *Harveston*, 493 So. 2d at 366.
[338] *Id.* at 369.
[339] *Id.* at 373.
[340] *Id.* at 374.
[341] *Id.*
[342] 607 So. 2d 1107 (Miss. 1992).
[343] *Russell*, 607 So. 2d at 1109.
[344] *Id.* at 1114.
[345] *Id.*

mind toward the victim, evidence of the victim's specific acts toward third parties was not relevant or admissible.[346]

Davis v. State[347]

Davis was convicted of capital murder and sentenced to death.[348] At trial, Davis made several attempts to show the victim's history of drug involvement, but the trial judge excluded the evidence.[349] The supreme court affirmed, holding that the character of the victim was not in issue and irrelevant in this homicide case.[350] Rule 404(a)(2) was cited, but not discussed.[351]

Note: The key factor is the reference in Rule 404(a)(2) to "pertinent trait of character." Rule 404(a)(2) is typically relied on by defendants to support their claim of self-defense, arguing that because the victim had an aggressive character, therefore, the victim was likely the aggressor. In *Davis*, the victim's tendency for drug use was not pertinent to any issue.[352]

Goff v. State[353]

b. Victim's Propensity for Violence: To Prove Victim Was First Aggressor

CASES:

Tolbert v. State[354]

Tolbert was convicted of the murder of his girlfriend.[355] There was no evidence that she had been the aggressor, rath-

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[346] *Id.* at 1116.
[347] 684 So. 2d 643 (Miss. 1996).
[348] *Davis*, 684 So. 2d at 647.
[349] *Id.* at 658.
[350] *Id.* at 658-59.
[351] *Id.* at 658.
[352] *Id.* at 658-59.
[353] 98-KA-00723-COA, 778 So. 2d 779 (Miss. Ct. App. 2000); *see supra* notes 18-27 for a recitation of the facts and discussion of this case.
[354] 511 So. 2d 1368 (Miss. 1987).
[355] *Tolbert*, 511 So. 2d at 1369.

er all the evidence indicated that Tolbert was, in fact, the aggressor.[356] Tolbert claimed that the incident was accidental.[357] Tolbert wanted to introduce evidence of the victim's character as a violent person who carried a gun and knew how to use it.[358] The trial court excluded this evidence and the supreme court affirmed.[359] The supreme court noted that evidence of the victim's character for violence is irrelevant until some evidence has been presented that the victim was the first aggressor.[360]

Robinson v. State[361]

Robinson was convicted of assault on a jailer.[362] Robinson claimed that the officer attacked him and that he had simply held the officer in a bear hug in order to stop the assault.[363] The jailer alleged that Robinson attacked him in an attempted escape.[364] At the close of the State's evidence, the State moved to exclude any mention of the officer's violent behavior toward prisoners.[365] The judge sustained the motion.[366] In the defendant's case-in-chief, Robinson testified to his version of the story, corroborated by another inmate.[367] They did not call the officer or any others.[368] The ruling, which excluded references to the jailer's violent acts, was affirmed.[369] At the time of the ruling, there was no evidence that the jailer had been the aggressor, so his violent nature was not an issue.[370] The court noted that after evidence the officer had attacked Robinson came in, evidence of his violent

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[356] *Id.* at 1374.
[357] *Id.*
[358] *Id.*
[359] *Id.*
[360] *Id.*
[361] 566 So. 2d 1240 (Miss. 1990).
[362] *Robinson*, 566 So. 2d at 1240.
[363] *Id.*
[364] *Id.*
[365] *Id.* at 1241.
[366] *Id.*
[367] *Id.* at 1242.
[368] *Id.*
[369] *Id.*
[370] *Id.* at 1241.

nature would be relevant.[371] However, it was never offered after that.[372] This was essentially a case of waiver by failing to offer evidence of the officer's violent character after the defendant said he was the first aggressor.[373]

Green v. State[374]

Green engaged in a shoot-out with a Mize policeman in which the policeman was killed.[375] Green was subsequently convicted of murder.[376] Green claimed self-defense and testified that the policeman had stopped him, verbally abused him, accused him of having sexual relations with the policeman's wife, pulled a gun and shot at him.[377] Green then got his rifle from his car and the shoot-out followed.[378] The trial judge allowed reputation evidence from five witnesses that the policeman was reputed to be a violent person.[379] However, the judge excluded evidence proffered by Green that he knew the policeman had been violent and abusive toward several people, including his own wife, and had made statements indicating a jealous suspicion of Green.[380] Also excluded was the testimony of the policeman's wife that since his brain surgery he had frequent episodes of violent rage and was very jealous.[381] This exclusion was reversed by the supreme court.[382] The defendant was entitled to show specific instances of violent behavior of the victim when there was a question of first aggression and a question of the defendant's state of mind.[383]

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[371] *Id.* at 1242.
[372] *Id.*
[373] *Id.*
[374] 614 So. 2d 926 (Miss. 1992).
[375] *Green*, 614 So. 2d at 927.
[376] *Id.*
[377] *Id.* at 927, 930.
[378] *Id.*
[379] *Id.* at 931.
[380] *Id.*
[381] *Id.*
[382] *Id.* at 937.
[383] *Id.* at 934-35.

Newsom v. State[384]

Brown v. State[385]

Brown was convicted of aggravated assault and kidnapping.[386] Brown had found his fiancee with the victim, beat up the victim, and kidnapped him.[387] Brown claimed error in the rejection by the trial court of his evidence of the victim's reputation for violence.[388] This was affirmed with no mention of Rule 405(b).[389] There was no evidence that the victim was the first aggressor; therefore, his character for violence was not relevant.[390]

Jackson v. State[391]

Jackson claimed he shot the murder victim in self-defense.[392] The trial judge excluded his offer of proof of specific instances of the victim's violent conduct, reasoning that they were inadmissible until the defense proved the victim's aggression.[393] This was held by the supreme court to be harmless error.[394] The court did not point to the evidence of the victim being the aggressor.[395] Rather, it held that there was plenty of other evidence of the victim's violent character; therefore, exclusion of the specific instances was not harmful.[396]

McGilberry v. State[397]

McGilberry went into a barber shop where the victim and

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[384] 629 So. 2d 611, 613-614 (Miss. 1993); *see supra* notes 7-17 and accompanying text for a recitation of the facts and discussion of this case.

[385] 98-KA-00058-COA, 749 So. 2d 204 (Miss. Ct. App. 1999).

[386] *Brown*, ¶¶ 1-2, 749 So. 2d at 207.

[387] *Id.* ¶ 2, 749 So. 2d at 207.

[388] *Id.* ¶ 19, 749 So. 2d at 212.

[389] *Id.* ¶ 20, 749 So. 2d at 212.

[390] *Id.* ¶¶ 19-20, 749 So. 2d at 212.

[391] 1999-KA-01582-SCT, 784 So. 2d 180 (Miss. 2001).

[392] *Jackson*, ¶ 21, 784 So. 2d at 184.

[393] *Id.* ¶¶ 21-22, 784 So. 2d at 184.

[394] *Id.* ¶ 25, 784 So. 2d at 185.

[395] *Id.* ¶¶ 21-30, 784 So. 2d at 184-86.

[396] *Id.* ¶ 30, 784 So. 2d at 186.

[397] 98-KA-00657-SCT, 797 So. 2d 940 (Miss. 2001).

others were watching a basketball game on the television, pulled a gun from beneath his shirt, and shot the victim.[398] For this, McGilberry was convicted of murder and sentenced to life.[399] The trial judge sustained a motion *in limine* by the State to exclude evidence that the victim and the defendant had been involved in an altercation a couple of months before the shooting, holding that it was too remote and not relevant to this shooting incident.[400] This was affirmed by the supreme court because there was no evidence that the victim was in any way aggressive or threatening to the defendant.[401] The victim's character for aggression was not in issue in the trial.[402]

c. Victim's Propensity for Violence: To Prove Defendant's Justifiable Fear/Reasonableness of Self-Defense

CASES:

Stoop v. State[403]

Stoop was convicted of murdering his wife's lover during a shoot out on a country road.[404] Stoop's evidence that the victim carried a gun and made threats against him was excluded.[405] This decision was reversed by the supreme court.[406] Evidence of the victim's conduct may be relevant to self-defense when it is doubtful who the aggressor was and, also, whether the act was justifiable.[407]

Heidel v. State[408]

Heidel was convicted of manslaughter for shooting his

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[398] *McGilberry*, ¶ 4, 797 So. 2d at 941.
[399] *Id.* ¶ 1, 797 So. 2d at 940.
[400] *Id.* ¶¶ 5-6, 797 So. 2d at 941.
[401] *Id.* ¶¶ 9, 21-22, 797 So. 2d at 942, 945.
[402] *Id.* ¶ 21, 797 So. 2d at 945.
[403] 531 So. 2d 1215 (Miss. 1988).
[404] *Stoop*, 531 So. 2d at 1216, 1218.
[405] *Id.* at 1219.
[406] *Id.* at 1220.
[407] *Id.*
[408] 587 So. 2d 835 (Miss. 1991).

wife.[409] He claimed self-defense, arguing that his wife had attacked him in their kitchen with a butcher knife.[410] During direct examination, Heidel described a spat they had the night of the shooting and said that he had gone to his bedroom and barricaded the door with a dresser for fear she would come at him with the knife.[411] The judge excluded his attempt to describe another recent incident where she attacked him with a knife.[412] This decision was reversed by the supreme court.[413] When Heidel claimed self-defense, his wife's character became an essential element of his defense and, under Rule 405(b), specific acts of violence were admissible to show his fear and support his claim that she was the aggressor.[414]

Note: Counsel almost lost this error by failing to make an offer of proof on the excluded evidence.[415] The appellate court saved it by finding that the excluded evidence was apparent from the context.[416]

Day v. State[417]

Day was convicted of murder.[418] He argued that he should have been permitted to present evidence of a long and bitter feud between himself and the victim, along with numerous threats made by the victim both directly to Day and to others about Day.[419] His defense was that he intended to shoot over the victim's head, making the incident an accident.[420] He argued that he was, at most, guilty of manslaughter because of his state of mind at the time of the

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[409] *Heidel*, 587 So. 2d at 836.
[410] *Id.* at 837.
[411] *Id.* at 843.
[412] *Id.* at 844.
[413] *Id.* at 846-47.
[414] *Id.*
[415] *Id.* at 844.
[416] *Id.*
[417] 589 So. 2d 637 (Miss. 1991).
[418] *Day*, 589 So. 2d at 637.
[419] *Id.* at 637, 639.
[420] *Id.* at 639-40.

shooting.[421] Day claimed his state of mind was of fear and panic when he shot the victim, because he thought the victim was coming at him with a razor.[422] The trial judge excluded evidence of several specific instances of the victim assaulting and threatening Day, apparently because the defendant was not claiming self-defense.[423] This decision was reversed.[424] The supreme court recognized that the usual reason for proving the violent character of the victim was to support a claim of self-defense.[425] Here, however, the evidence was relevant to prove the defendant's state of mind at the time of the shooting, which is the crucial distinction between murder and manslaughter.[426]

Johnson v. State[427]

Johnson, who claimed self-defense, was convicted of assault.[428] The trial judge excluded proof of the victim's three prior burglary and larceny convictions.[429] However, Johnson was permitted to prove that the victim was just released from prison.[430] The ruling about the convictions was affirmed in a vague manner.[431] Apparently, Johnson argued they were admissible to support his self-defense claim under Rule 405(b), inferring the victim's violent character.[432] The court of appeals failed to mention this rule, but affirmed on the basis that the convictions were not of the nature to attack the credibility of the victim.[433]

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[421] *Id.*
[422] *Id.* at 641.
[423] *Id.* at 644.
[424] *Id.*
[425] *Id.*
[426] *Id.*
[427] 97-KA-00345-COA, 723 So. 2d 1205 (Miss. Ct. App. 1998).
[428] *Johnson*, ¶¶ 1-2, 6, 723 So. 2d at 1206.
[429] *Id.* ¶ 24, 723 So. 2d at 1209.
[430] *Id.* ¶ 26, 723 So. 2d at 1209.
[431] *Id.* ¶ 27, 723 So. 2d at 1210.
[432] *Id.* ¶¶ 24-25, 723 So. 2d at 1209.
[433] *Id.* ¶ 26, 723 So. 2d at 1209-10.

Hamilton v. State[434]

Hamilton was convicted of murdering his ex-wife by multiple stabbings.[435] Hamilton claimed self-defense, testifying that when he got in an argument with his wife, he was scared because she had already assaulted the man she was then living with.[436] The trial judge excluded proffered testimony of a police officer that the officer had responded to that previous stabbing incident, and that the victim was charged and eventually pled guilty to domestic violence.[437] The court of appeals held it was error to exclude Hamilton's evidence of prior violent specific instances of conduct by the victim.[438] Under recent cases, such evidence is admissible to support a claim of self-defense.[439] However, the error here was harmless in view of the overwhelming evidence of Hamilton's guilt.[440]

III. MISSISSIPPI RULE OF EVIDENCE 404(b): ADMISSIBILITY OF OTHER CRIMES, WRONGS OR ACTS TO PROVE OTHER CONSEQUENTIAL FACTS

There are no exceptions to the exclusionary rule, as it is sometimes written, but there are disputed issues on which this kind of evidence may be relevant, other than proving the person acted in conformity with his or her character.

Note that the drafters went to trouble to repeat the basic exclusionary rule of Rule 404(a) in drafting Rule 404(b). This apparently was to emphasize that evidence admissible on these other issues may not also be considered for the logical inference that if the defendant had the character to commit crimes then he probably committed this particular crime.

The drafters then listed "other purposes"—other facts or issues which may be disputed in cases and upon which evidence of other bad acts may be relevant. The list is not exhaustive, since its terms are open-ended. Lawyers and courts

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[434] 97-KA-00509-COA, 742 So. 2d 1173 (Miss. Ct. App. 1999).
[435] *Hamilton*, ¶¶ 1, 3, 742 So. 2d at 1174-75.
[436] *Id.* ¶¶ 9-10, 742 So. 2d at 1176-77.
[437] *Id.* ¶ 12, 742 So. 2d at 1177.
[438] *Id.* ¶ 15, 742 So. 2d at 1178.
[439] *Id.* ¶ 14, 742 So. 2d at 1178-79.
[440] *Id.* ¶ 21, 742 So. 2d at 1180.

have been creative in finding other unlisted purposes justifying evidence of this type. There are now more unlisted, common law purposes than listed purposes. The courts often identify more than one issue on which the evidence is said to be relevant; therefore, some of the cases are noted under different categories.

The cases are presented below under the categories of *Listed Other Purposes*—those listed in the rule—and the *Unlisted Other Purposes* which are essentially common law in origin.

A. Procedural Issues

In very few of the opinions dealing with Rule 404(b) evidence, has either the trial judge or the appellate court addressed the full measure of procedural requirements adopted by the Mississippi Supreme Court in early cases.

In *Houston v. State*,[441] the supreme court stated that "[b]efore evidence may be received [of other bad acts] the proponent must articulate precisely the evidential hypothesis by which the consequential fact [such as the defendant's intent] may be inferred from the proffered evidence . . . ."[442]

In *Edlin v. State*,[443] the supreme court quoted from *Weinstein's Evidence*, the noted treatise on the federal rules, that:

> [C]ounsel must be prepared to (1) identify the consequential fact to which the proffered evidence of other crimes, wrongs or acts is directed, (2) prove the other crimes, wrongs, or acts, and (3) articulate precisely the evidential hypothesis by which the consequential fact may be inferred from the proffered evidence. Evidence which passes muster up to this point must, in addition, satisfy the balancing test imposed by Rule 403 which requires the probative value of the other crimes evidence to outweigh the harmful consequences that might flow from its admission.[444]

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[441] 531 So. 2d 598 (Miss. 1988); *see infra* notes 451-58 and accompanying text.

[442] *Houston*, 531 So. 2d at 607-08.

[443] 533 So. 2d 403 (Miss. 1988); *see supra* notes 29-34 and accompanying text; *infra* notes 459-63 and accompanying text.

[444] *Edlin*, 533 So. 2d at 408 (quoting 2 JACK B. WEINSTEIN & MARGARET A.

Note that in this quotation approved by the court, the actual balancing test of Rule 403 is reversed. Rule 403 states that relevant evidence may be excluded if the probative value is substantially outweighed by the prejudicial effect. That burdens the objector to persuade the court of the substantial prejudicial effect. The statement above requires that the probative value outweigh the prejudicial effect in order to be admitted. This burdens the offering attorney to persuade that the probative value is greater than the prejudice.

Finally, in *Darby v. State*,[445] the supreme court articulated the most specific set of procedural restrictions on such evidence, adopting the predicate requirements from Fifth Circuit Court of Appeals decisions.[446] When other crimes or acts of the defendant are offered, the trial court must first weigh probative value against the prejudice under Rule 403.[447] Then the trial judge must be satisfied that:

> 1) there is plain, clear and convincing evidence of a similar offense, 2) the offense is not too remote in time, 3) the element of the similar crime for which there is a recognized exception is a material issue in the case, and 4) there is a substantial need for the probative value of the evidence. The danger of prejudicial effect inherent in the use of similar acts evidence is such that all prerequisites must be met before the evidence may be admitted.[448]

Under these holdings, the proponent of the evidence and the trial judge may be held to the following:

BERGER, WEINSTEIN'S FEDERAL EVIDENCE ¶ 404-08], at 404-53 through 404-54 (1986)).

[445] 538 So. 2d 1168 (Miss. 1989); *see infra* notes 464-68 and accompanying text.

[446] *Darby*, 538 So. 2d at 1173 (citing United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) and United States United States v. Silva, 580 F.2d 144 (5th Cir. 1978)).

[447] *Id.*

[448] *Id.*

1. Predicate for Admissibility

a. Elements

(1) The proponent should be required to state precisely the disputed issue(s) in the case on which the evidence is relevant and which of the many "other purposes" is the point of relevancy.

(2) The proponent should be required to articulate the "evidential hypothesis"—the logical reasoning by which the disputed fact may be inferred from the evidence of other crimes, wrongs or acts.

(3) The proponent should be required make an offer of the proof available to prove the defendant committed the other crimes, wrongs or acts. This offer should show that it satisfies the burden of proof required for such evidence.

b. Burden of Proof

The most precise burden of proof so far articulated by the supreme court is that of clear and convincing evidence first stated in *Darby*. In *Houston*, the court just wrote that the evidence had to show that the defendant did the other bad acts. In *Lester v. State*,[449] the court held that the evidence must show that the defendant did the other acts, "not necessarily by a preponderance."[450] This is a thoroughly ambiguous statement which could mean the evidence must show more than a preponderance or less of a preponderance. The holding in *Darby* should be taken as the only standing precise statement of the burden of proof.

2. Judicial Duties

(1) The judge should then conduct a thorough Rule 403 balancing test to determine if the probative value is greater than the prejudicial effect. This obviously cannot be done un-

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[449] 692 So. 2d 755 (Miss. 1997); *see infra* notes 482-84 and accompanying text.
[450] *Lester*, 692 So. 2d at 779.

less the proponent has identified the purpose(s) for which the evidence is relevant and the reasoning which leads to the claimed inference. The proponent must also show that there is clear and convincing evidence that the defendant committed the other acts. There is more on the Rule 403 balancing test below.

(2) If the trial court decides to admit the evidence, then, unless the defendant requests otherwise, the judge should give a limiting instruction. The limiting instruction should limit consideration of the evidence to deciding the disputed issue(s) identified by the proponent, and prohibit consideration of the evidence for the general proposition that the defendant committed this crime because he had committed the other bad acts shown. There is more on limiting instructions below.

CASES:

Houston v. State[451]

Defendant was convicted of capital murder after abusing her fourteen-year-old daughter and killing her.[452] On the issue of intent, the State was permitted to prove several instances where school personnel and others had noticed bruises and scratches on the daughter; the most recent being fifteen months before her death.[453] The only evidence connecting Houston to any prior abuse was hearsay statements by the victim to others.[454] This decision was reversed.[455] The supreme court observed the highly prejudicial nature of such evidence of abuse, and failed to find any logical link between the other instances of abuse and Houston's inferred intent in the incident causing her daughter's death.[456] The court wrote: "Before evidence may be received [of other bad acts], the proponent must articulate precisely the evidential hypothesis by which the consequential fact, [her intent], may be inferred from

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[451] 531 So. 2d 598 (Miss. 1988).
[452] *Houston*, 531 So. 2d at 600.
[453] *Id.* at 603-04.
[454] *Id.* at 609.
[455] *Id.* at 609-10.
[456] *Id.* at 607-08.

the proffered evidence . . . ."[457] The appellate court also held that the daughter's hearsay statements were inadmissible to prove Houston committed the other acts of abuse; therefore, there was no evidence that Houston committed those acts.[458]

Edlin v. State[459]

The opinion quoted extensively from *Weinstein's Evidence* to approve the analytical process and reasoning used to determine the admissibility of "other crimes" evidence suggested in the treatise.[460] The supreme court quoted the following as the burden of the proponent, usually the prosecutor, of such evidence:

> Rule 404(b) is a specialized rule of relevancy. Accordingly, as with any determination pursuant to Rule 401, counsel must be prepared to (1) identify the consequential fact to which the proffered evidence of other crimes, wrongs or acts is directed, (2) prove the other crimes, wrongs, or acts, and (3) articulate precisely the evidential hypothesis by which the consequential fact may be inferred from the proffered evidence. Evidence which passes muster up to this point must, in addition, satisfy the balancing test imposed by Rule 403 which requires the probative value of the other crimes evidence to outweigh the harmful consequences that might flow from its admission.[461]

The prosecutor in this case argued during closing that the acts of violence toward the former girlfriend showed Edlin was of a violent nature.[462] The court found that even if such evidence is properly admitted on some disputed issue, the prosecutor may inject error into the case on closing by inviting the jury to misuse the evidence as proving bad character, arguing the

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[457] *Id.*

[458] *Id.* at 607-09.

[459] 533 So. 2d 403 (Miss. 1988); *see supra* notes 29-34 and accompanying text for a recitation of the facts and discussion of another evidentiary issue of this case.

[460] *Edlin*, 533 So. 2d at 407-08.

[461] *Id.* at 408 (quoting 2 WEINSTEIN & BERGER, *supra* note 444, ¶ 404[08], at 404-53 through 404-54).

[462] *Id.* at 408.

"it-happened-once-it-could-happen-again" theory of logical relevance.[463]

Darby v. State[464]

This was one of the early decisions under Rule 404(b) in which the court dealt in some detail with the required predicate and considerations involved in deciding admissibility of "other crimes" evidence. First, when other crimes or acts of the defendant are offered, the trial court must weigh its probative value against its prejudice per Rule 403.[465] Then, the trial judge must be satisfied that

> 1) there is plain, clear and convincing evidence of a similar offense, 2) the offense is not too remote in time, 3) the element of the similar crime for which there is a recognized exception is a material issue in the case, and 4) there is a substantial need for the probative value of the evidence. . . . [The] prejudicial effect inherent in the use of similar acts evidence is such that all prerequisites must be met before the evidence may be admitted.[466]

The court did not apply the detailed rules it quoted, other than observing that the trial judge ruled that Darby's other crimes would be admissible, without stating reasons.[467] The court recited the exclusionary rule and held that the trial judge erred in ruling Darby's previous crimes would be admissible, depriving him of the substantial right to present evidence in his defense.[468]

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[463] *Id.*

[464] 538 So. 2d 1168 (Miss. 1989); *see supra* notes 35-42 and accompanying text for a recitation of the facts and discussion of another evidentiary issue of this case; *infra* notes 629-38 for a discussion of another evidentiary issue presented in this case.

[465] *Darby*, 538 So. 2d at 1173.

[466] *Id.* at 1173 (citing United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) and United States v. Silva, 580 F.2d 144 (5th Cir. 1978)).

[467] *Id.*

[468] *Id.*

Bounds v. State[469]

Defendant and the victim were live-in lovers for a long time prior to Bounds kidnapping her.[470] The victim testified that during a period of separation, Bounds broke into her trailer, dragged her into his car, and then drove away.[471] Bounds testified that she voluntarily came with him after he accidentally broke her window, and that he was simply taking her to the hospital so that she could deliver their baby.[472] The jury convicted him solely of trespass.[473]

The victim was permitted to testify that Bounds had shot at her and roughed her up on two prior occasions, but she did not testify as to when these incidents occurred.[474] The trial judge found these incidents relevant to Bounds' and the victim's state of mind, and told the prosecutor to provide a time frame for such evidence, which was never done.[475] Additionally, the trial judge did not give a limiting instruction about the other "bad act" evidence.[476] For this and other reasons, the supreme court reversed.[477]

The court held that the "bad act" evidence can only be relevant if related to a time pertinent to the issues in the case.[478] The trial court was excused for failing to give the limiting instruction because the case requiring that, *Smith v. State,*[479] had not yet been decided by the court.[480] The court cautioned that the instruction is now required without a request from the defendant whenever "bad act" evidence is admitted.[481]

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[469] 688 So. 2d 1362 (Miss. 1997).
[470] *Bounds*, 688 So. 2d at 1364-65.
[471] *Id.*
[472] *Id.* at 1365.
[473] *Id.*
[474] *Id.* at 1369.
[475] *Id.* at 1370.
[476] *Id.* at 1371.
[477] *Id.* at 1373.
[478] *Id.* at 1371.
[479] 656 So. 2d 95 (Miss. 1995); *see infra* notes 518-26 and accompanying text.
[480] *Bounds*, 688 So. 2d at 1372.
[481] *Id.*

Lester v. State[482]

The court held that when bad acts are admissible, they must be accompanied by evidence sufficient to support a finding—not necessarily by a preponderance—that the defendant actually did the acts.[483] Allowing evidence of the sexual abuse of the baby without proof that Lester committed the act was reversible error.[484]

Note: It is suggested that the court misspeaks here. The inquiry presented by an offer of evidence showing other crimes, wrongs or acts seems surely a question of admissibility for the court under Rule 104(a), not a question of conditional relevancy decided by the jury under Rule 104(b).

3. Sua Sponte Rule 403 Balancing (a Misnomer)

a. Probative v. Prejudice Balancing on Past Acts of the Accused

After several years of dealing with the issue and hinting that all Rule 404(b) offers of proof should be subjected to a Rule 403 balancing, in 1995 the supreme court, in *Smith v. State*,[485] laid down a rule for future application. That rule is that an objection to the evidence automatically requires the judge to conduct a Rule 403 balancing and to give a limiting instruction unless the defense does not want it.[486] This is required of the judge *sua sponte*, without a motion from the defense.[487] Several reversals have occurred since then because the judge did not conform to these requirements.

To refer to this as a Rule 403 analysis is a misnomer. Actually, it is an inverted Rule 403 balancing. Rule 403 provides that relevant evidence may be inadmissible if the probative

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[482] 692 So. 2d 755 (Miss. 1997); *see supra* notes 74-84, 232-35 and accompanying text for a recitation of the facts and discussion of other evidentiary issues of this case; *infra* notes 803-05, 1142-45 and accompanying text for a discussion of other evidentiary issues of this case.

[483] *Lester*, 692 So. 2d at 779, 782-83.

[484] *Id.* at 782-83.

[485] 656 So. 2d 95 (Miss. 1995).

[486] *Smith*, 656 So. 2d at 100.

[487] *Id.*

value is substantially outweighed by the prejudicial effect of the evidence. Rule 403 assumes admissibility and places the burden on the objecting party to persuade the judge that the prejudicial effect substantially outweighs its value. Rule 403, applied to Rule 404(b) evidence, reverses this process. As described in *Edlin*, the evidence is initially presumed to be unfairly prejudicial.[488] The burden is then on the offering party to persuade the judge that the probative value outweighs that prejudice.[489] This is actually the balancing analysis required in considering admissibility of convictions to impeach under Rule 609.

The efforts of the trial judges to do this balancing and place it on the record seem to have been general at best. The judges usually dictate on the record that they have balanced the probative value of the evidence against the prejudicial effect, and think the evidence more probative than prejudicial. They have sometimes mentioned a specific issue. This has generally been sufficient to satisfy the appellate courts.

In truth, the appellate courts have given the trial judges very little guidance as to what they should consider in the balancing process. The closest the courts have come was in *Hickson v. State*,[490] in which in considering Rule 404(b) evidence, the supreme court borrowed the *Peterson* factors, which are to be used in the balancing process when prior convictions are offered to impeach a defendant under Rule 609.[491]

In *Peterson v. State*,[492] the supreme court adopted five factors to guide trial judges in ruling on admissibility of convictions to impeach: (1) Impeachment value of the crime; (2) time of the conviction and the witness's record since then; (3) similarity of the crimes; 4) importance of the witness's testimony; and (5) centrality of the credibility issue.[493] All but factors (2) and (3) relate solely to impeachment and credibility while not

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[488] 533 So. 2d 403, 408 (Miss. 1988).
[489] *Edlin*, 533 So. 2d at 408.
[490] 697 So. 2d 391 (Miss. 1997); *see infra* notes 527-35 and accompanying text.
[491] *Hickson*, 697 So. 2d 396-97.
[492] 518 So. 2d 632 (Miss. 1987).
[493] *Peterson*, 518 So. 2d at 636.

helping in the assessment of Rule 404(b) evidence.

The authors of a fine evidence treatise have identified nine factors which may be considered by courts in balancing Rule 404(b) evidence.[494] These factors were drawn from many federal court cases construing and applying this rule. These are points which counsel might, when applicable, call the attention of a trial judge to and argue for or against the admission of the evidence. These factors may also be points of argument on appeal, supportable with the authorities cited in the treatise, which may eventually lead to the United States Supreme Court adopting some specific guidelines to assist in this intricate and complex process of applied logic.

The factors listed are:

(1) *Extent to which the point to be proved is disputed.*[495]

The less disputed an issue is the less is its probative value and the greater its prejudice. The more intense the dispute the greater the probative value. An offer to stipulate on an issue may remove all the probative value and leave only the prejudice.

(2) *Adequacy of proof of the prior misconduct.*[496]

This factor deals with the burden of proof on the "other crime" evidence. The weaker the adequacy of proof is, the less the probative value.

(3) *Probative force of the evidence.*[497]

The more remote in time or logical relevance to the point to be proven, the weaker the probative value.

(4) *Proponent's need for the evidence.*[498]

If the proponent has other evidence on the disputed issue, then the "other crimes" evidence on that same point becomes less probative and more prejudicial.

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[494] *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.16, at 221-25 (2nd ed. 1999).

[495] *Id.* § 4.16, at 222.

[496] *Id.* § 4.16, at 222-23.

[497] *Id.* § 4.16, at 223.

[498] *Id.*

(5) *Availability of less prejudicial proof.*[499]

This is tied to the fourth factor, but suggests, for instance, that if the prosecution has other identification evidence such as fingerprints, an eyewitness, etc., then there is less need for, and less probative value in, proving another crime to show identification.

(6) *Inflammatory or prejudicial effect.*[500]

The more the "other crimes" evidence is likely to inflame the jury and excite their passions, the greater the unfair prejudice. Highly inflammatory evidence should require a strong degree of probative strength to justify the resulting prejudice. The cases in which evidence of prior severe child abuse is allowed on the question of the defendant's intent or motive in the abuse trial, are good examples.

(7) *Similarity to charged crime.*[501]

This relates to the sixth factor in that the more similar the past crime is to the charged crime the stronger the inference the jury is likely to draw that "if defendant did it before then he or she probably did it this time too." This is also an important factor in deciding the admissibility of prior convictions to impeach. The stronger the similarity, the greater the unfair prejudice, therefore requiring greater probative value to overcome the negative prejudice in the Rule 403 balancing.

(8) *Effectiveness of a limiting instruction.*[502]

This calls for the judge to try to decide if the jury can objectively accept and apply a limiting instruction. If the "other crimes" evidence is likely to be highly inflammatory or is of a similar crime, then the jury will have a harder time with this mental gymnastic. The trial court might be reminded that in *Wilkins v. State*[503] the supreme court quoted a *Harvard Law Review* article that stated that a

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[499] *Id.*

[500] *Id.* § 4.16, at 223-24.

[501] *Id.* § 4.16, at 224.

[502] *Id.* § 4.16, at 224-25.

[503] 603 So. 2d 309 (Miss. 1992).

limiting instruction in a similar context was but a "pious fraud."[504]

(9) *Extent to which prior act evidence prolongs proceedings.*[505]

If the prior act must be proven by the calling of witnesses, cross-examination of those witness, and possibly counter-proof by the defendant, the trial may be greatly prolonged. Also, this may introduce a level of confusion into the trial if the jury has to make a mini-trial decision on whether the prior act was committed by the defendant, before it can get to the primary decision on guilt of the charged crime. These Rule 403 factors would weigh against admissibility for reasons other than prejudice.

There will never be a situation in which all or even most of these factors are pertinent points of argument. But, in most cases, an attorney may argue one or more of these factors to inform and persuade the trial judge on the admissibility of the past crimes or misconduct of the defendant. Such arguments should be on the record, either in the transcript or briefs, so the appellate court can see that the trial judge was exposed to these arguments and authorities, and therefore will be better equipped to decide if there was error in ruling on the evidence.

CASES:

Jenkins v. State[506]

Jenkins was convicted of attempted kidnapping of a customer in a store parking lot.[507] Jenkins claimed the attempt to kidnap and rob the customer was committed by his partner.[508] Both attempts failed when the customer refused to get into Jenkins's car and walked away from them.[509] The State was allowed to present evidence that they went to the store to

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[504] *Wilkins*, 603 So. 2d at 319 (quoting Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 193 (1948)).

[505] MUELLER & KIRKPATRICK, *supra* note 494, § 4.16, at 225.

[506] 507 So. 2d 89 (Miss. 1987).

[507] *Jenkins*, 507 So. 2d at 90.

[508] *Id.*

[509] *Id.* at 90-91.

rob it.[510] This ruling was affirmed by the supreme court as evidence of their intent when they went to the store, which carried over to their intent to rob the customer.[511] The court noted that, although relevant, evidence of other crimes may be excluded as more prejudicial than probative, and the trial judge should conduct a Rule 403 balancing in deciding the admissibility of such evidence.[512]

Haynes v. State[513]

Haynes was convicted of assault for shooting the woman who was to be prosecutrix against him in a rape trial set to begin the day following the shooting.[514] The trial judge allowed the State to present evidence of the pending rape charges to prove Haynes's motive in the assault of the prosecutrix.[515] This was affirmed because the evidence was relevant to his motive.[516] The supreme court again referred to the requirement that such evidence pass a Rule 403 balancing to be admissible.[517]

Smith v. State[518]

Smith was convicted of possession of crack with the intent to distribute.[519] The trial judge, after a Rule 403 balancing, admitted evidence of two prior unconvicted sales of crack on the issue of intent.[520] The supreme court affirmed, noting the case was one of first impression.[521] The amount of crack and money found on Smith at his arrest was unremarkable, and there was no evidence of intent other than the two sales which

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[510] *Id.* at 90.
[511] *Id.* at 90-91.
[512] *Id.* at 92-93.
[513] 520 So. 2d 1367 (Miss. 1988); *see infra* notes 1633-35 and accompanying text for a discussion of another evidentiary issue of this case.
[514] *Haynes*, 520 So. 2d at 1367-68.
[515] *Id.* at 1368-69.
[516] *Id.* at 1369.
[517] *Id.*
[518] 656 So. 2d 95 (Miss. 1995).
[519] *Smith*, 656 So. 2d at 97-98.
[520] *Id.* at 98.
[521] *Id.* at 99.

occurred two years prior to the arrest.[522] He had not offered to sell on this occasion, and there was no evidence of sales closer in time.[523] The case was reversed by the supreme court because the only evidence of intent was that of the two-year-old sales, and this evidence was held insufficient to prove the element of intent.[524]

The court announced an important rule for dealing with "other crimes" evidence. The court stated that in future cases when Rule 404(b) evidence is offered, an objection automatically places the duty on the trial court to conduct a Rule 403 balancing on the proffer.[525] If the objection is overruled, then the trial judge is to give a limiting instruction concerning that evidence, unless the defense requests that it not be given.[526]

Hickson v. State[527]

Hickson was convicted of sexual battery, the court of appeals affirmed, and the supreme court granted certiorari.[528] Hickson had moved *in limine* at trial to exclude evidence of his prior conviction of the same crime.[529] The State argued for the evidence's relevance under Rule 404(b) to prove Hickson's *modus operandi*.[530] The trial judge ruled the evidence of the prior convictions admissible and the defendant, thus "chilled", did not testify, and made no offer of proof of his testimony.[531] The trial judge did not make a record of his findings in balancing probative value against prejudice.[532] This failure to make an on the record determination that the probative value of admitting the evidence outweighed the prejudicial effect on Hickson caused reversal.[533]

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[522] *Id.* at 99-100.
[523] *Id.*
[524] *Id.* at 100-01.
[525] *Id.* at 100.
[526] *Id.*
[527] 697 So. 2d 391 (Miss. 1997).
[528] *Hickson*, 697 So. 2d at 392-93.
[529] *Id.* at 396.
[530] *Id.*
[531] *Id.*
[532] *Id.*
[533] *Id.* at 397.

Although the State argued the admissibility of the prior conviction under Rule 404(b), the supreme court applied the balancing rules for convictions offered under Rule 609 as evidence to impeach.[534] The court recited the full litany of the *Peterson* factors, and held it reversible error to fail to make the on the record determination.[535]

Robinson v. State[536]

Robinson's conviction of forgery was reversed because the trial judge failed to issue a limiting instruction when "other crimes" evidence was introduced against Robinson.[537] A police officer testified that when he investigated this case, Robinson was in jail on unrelated charges.[538] The defense objected and moved for a mistrial.[539] The supreme court recited the standing authority that when Rule 404(b) evidence is introduced, the trial judge must conduct a Rule 403 balancing and give a limiting instruction unless the defendant objects.[540] This was not done and the failure to do so resulted in reversal.[541]

Note: The evidence hinting at other crimes apparently had no purpose other then to explain the police investigation—nothing relevant to this case. Therefore, there was no probative value to offset against the prejudicial effect. In addition, there was no other purpose to guide a limiting instruction. The proper remedy would have been to strike the evidence and poll the jury to assure they would not consider it.

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[534] *Id.* at 396-97.
[535] *Id.* at 398.
[536] 96-KA-01150-SCT, 735 So. 2d 208 (Miss. 1999).
[537] *Robinson*, ¶¶ 10-11, 735 So. 2d at 212.
[538] *Id.* ¶ 3, 735 So. 2d at 209-10.
[539] *Id.*
[540] *Id.* ¶ 4, 735 So. 2d at 210.
[541] *Id.* ¶ 5, 735 So. 2d at 210.

Lindsey v. State[542]

Lindsey was convicted of murder.[543] At trial, witness was allowed, over objection, to testify that on the day following the shooting, the witness was robbed at gunpoint by Lindsey.[544] In the course of the robbery Lindsey had said "I just killed a red motherf_____in north Mississippi, do you want to be next?"[545] The trial judge was disturbed by the ambiguity of the statement but allowed it at the State's urging as relevant to identity.[546] The allowance of the statement was held to be error, but found to be harmless.[547] The court of appeals acknowledged that "other crime" evidence may be relevant to identity, but the lack of a clear connection between the crime referred to in the statement and the murder in this case made its relevance weak when balanced against its substantial prejudicial effect.[548] The error was harmless, however, because of other substantial evidence which identified Lindsey as the shooter in this case.[549]

Note: The evidence of the robbery the following night and Lindsey's statement about the other killing was not needed to prove the identity of the killer in this case, but it had an unfair prejudicial effect on the jury when the jury learned that Lindsey had committed an armed robbery of the witness the next day and bragged about the killing of the previous day.[550] The court of appeals concentrated on the point of the relevancy of the evidence to show identity and concluded there was plenty of other evidence to prove identity, so the error was harmless.[551] The court did not analyze the prejudicial aspect of the ruling and whether it was somehow harmless also.

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[542] 98-KA-00217-COA, 754 So. 2d 506 (Miss. Ct. App. 1999).
[543] *Lindsey*, ¶ 1, 754 So. 2d at 507.
[544] *Id.* ¶ 46, 754 So. 2d at 515.
[545] *Id.*
[546] *Id.* ¶¶ 48-50, 754 So. 2d at 516-17.
[547] *Id.* ¶¶ 50-53, 754 So. 2d at 517-18.
[548] *Id.* ¶ 50, 754 So. 2d at 517.
[549] *Id.* ¶¶ 52-53, 754 So. 2d at 517-18.
[550] *Id.* ¶ 51, 754 So. 2d at 517.
[551] *Id.* ¶¶ 52-53, 754 So. 2d at 517-18.

b. Probative v. Prejudice When Other Acts Were by Another Person

There will be the occasional case in which evidence will be offered of the past acts of a person other than the accused. The accused may offer that evidence to show that someone else had the motive, intent, opportunity, or plan to commit the charged crime, or to identify someone else as the culprit. The State may offer evidence of crimes or other acts of a person other than the accused after showing that the accused was associated with that person in committing the charged crime. In these situations, the prejudice which might flow from the evidence is minimized and, assuming some probative value of the evidence, the probative value will usually outweigh any prejudice to the defendant.

The analogous authority for this proposition is found in recent cases involving the use of prior convictions to impeach under Rule 609. The supreme court has recognized that the balancing of probative value against prejudice is essentially the same when convictions are offered under Rules 609 or 404(b). In *White v. State,*[552] the defendant had been prevented in the trial court from impeaching a State's witness with a felony drug conviction.[553] The supreme court reversed, holding that the right of confrontation required that the accused be allowed the right to impeach the witness.[554] The court reasoned that the State does not enjoy the same protection from prejudice as does an accused.[555] This reasoning allows the accused greater latitude in introducing evidence of the past acts of another person with some probative value because there would be no unfair prejudice to a party arising from the evidence. The principle works in reverse when the State seeks to offer prior convictions (bad acts) of a person other than the defendant, because there is no unfair prejudice to the defendant.

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[552] 1998-CT-01099-SCT, 785 So. 2d 1059 (Miss. 2001).
[553] *White*, ¶ 4, 785 So. 2d at 1061.
[554] *Id.* ¶ 6, 785 So. 2d at 1061.
[555] *Id.*

4. The Required Limiting Instruction

These cases show that it is error to fail to give a limiting instruction when Rule 404(b) evidence is admitted, although the appellate courts have sometimes failed to reverse after a harmless error analysis.

A point to note is that in two kinds of cases there is no need for a limiting instruction. In *Henton v. State*,[556] the supreme court held that if the evidence is admitted as an element of the charged crime, a limiting instruction is not required.[557]

In several of the cases, the trial judges in the limiting instruction do not specify any limited purpose(s) on which the jury can consider the evidence. Rather, the trial judge tells the jury that the evidence can only be considered on "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," reciting the full list of "other purposes" from Rule 404(b). Such an instruction is vague, ambiguous and confusing, and there is no way a jury can apply the instruction. It also indicates that the judge did not do a Rule 403 balancing of the evidence on any particular issue(s) on which the evidence might be relevant.

The appellate courts have so far been willing to accept this as an adequate compliance with the rules. However in *Scruggs v. State*,[558] the court of appeals recognized that such an instruction may be overly broad, i.e., useless, and implied that a limiting instruction should be narrowed to the specific issue that is relevant.[559] However, there was no objection to the instruction, so the issue was not preserved for appeal and the court was prevented from determining whether the broad instruction was in fact error.

Defense counsel should object to such an overly broad instruction as vague, ambiguous, misleading and unintelligible.

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[556] 1998-KA-01889-SCT, 752 So. 2d 406 (Miss. 1999); *see infra* notes 567-74 and accompanying text.

[557] *Henton*, ¶ 8, 752 So. 2d at 408.

[558] 1998-KA-01344-COA, 756 So. 2d 817 (Miss. Ct. App. 2000); *see infra* notes 595-602 and accompanying text.

[559] *Scruggs*, ¶ 14, 756 So. 2d at 821.

CASES:

Ford v. State[560]

In an earlier opinion, the supreme court had affirmed Ford's conviction of conspiracy to commit grand larceny.[561] In this opinion, Ford appealed his conviction of grand larceny in a bank robbery.[562] The State was allowed to prove that the day after the charged crime occurred, Ford was involved in a bank robbery in West Memphis in which he and his partner used the identical method.[563] The trial judge gave a limiting instruction to the jury that the evidence of the other crime could only be considered to prove "motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident," and that it was not proof that he committed the crime charged.[564] The supreme court affirmed the trial court's decision.[565] The evidence was admissible for the purposes listed, and the jury was properly instructed.[566] However, neither the trial judge nor the supreme court identified the particular issues on which the evidence was relevant.

Henton v. State[567]

Henton was convicted of aggravated assault and of possession of a firearm by a convicted felon.[568] The trial judge did not give a limiting instruction concerning the proof of the prior felony conviction—apparently the conviction was of intimidating a witness.[569] The prosecutor argued to the jury that it was natural for one of the witnesses to be reluctant to testify given the defendant's history of intimidating witnesses.[570] The su-

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[560] 555 So. 2d 691 (Miss. 1989).

[561] *See* Ford v. State, 546 So. 2d 686, 687-89 (Miss. 1989); *infra* notes 1617-20 and accompanying text.

[562] *Ford*, 555 So. 2d at 692.

[563] *Id.* at 692-96.

[564] *Id.* at 693.

[565] *Id.* at 695-96, 698.

[566] *Id.* at 695-96.

[567] 1998-KA-01889-SCT, 752 So. 2d 406 (Miss. 2000).

[568] *Henton*, ¶ 1, 752 So. 2d at 407.

[569] *Id.* ¶ 7, 752 So. 2d at 407-08.

[570] *Id.* ¶ 15, 752 So. 2d at 410 (Banks, J., dissenting).

preme court found no reversible error in either of these actions.[571] The court explained that when the prior conviction is proved as an element of the crime charged, there is no requirement for a *sua sponte* limiting instruction like there is when the past acts are shown to prove some disputed fact issue in the case.[572] The trial court had instructed the jury that closing arguments are not evidence, and an argument not supported by evidence was to be disregarded.[573] This instruction was held to be adequate to prevent prejudice from the improper argument.[574]

Bradford v. State[575]

Bradford was convicted of felony child abuse of the two-year-old son of the woman with whom he lived.[576] The mother left the baby and three older children with Bradford while she went to an appointment.[577] When she returned, the baby had bruises, a skull fracture, rib fractures and internal injuries.[578] Bradford claimed the baby was injured in a fall.[579] The trial judge allowed into evidence that two weeks earlier, the baby had been examined and was found to have a broken arm, broken clavicle, scratches, bruises and burn marks.[580] The jury was instructed that the evidence could not be considered to determine the guilt or innocence of the crime charged, but could be considered as the jury deemed proper as relating to "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."[581] The court of appeals affirmed the trial court's decision.[582] The court focused on the evidence as negating Bradford's claim that the injuries

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[571] *Id.* ¶¶ 11-12, 752 So. 2d at 409.
[572] *Id.* ¶¶ 7-8, 752 So. 2d at 408.
[573] *Id.* ¶ 11, 752 So. 2d at 409.
[574] *Id.*
[575] 1998-KA-01699-COA, 759 So. 2d 434 (Miss. Ct. App. 2000).
[576] *Bradford*, ¶ 1, 759 So. 2d at 435.
[577] *Id.* ¶ 5, 759 So. 2d at 436.
[578] *Id.*
[579] *Id.* ¶ 12, 759 So. 2d at 437.
[580] *Id.* ¶ 9, 759 So. 2d at 437.
[581] *Id.*
[582] *Id.* ¶¶ 10-13, 759 So. 2d at 437.

were from an accidental fall.[583] The court also viewed the evidence as relevant in order to tell the jury a complete story.[584]

Note: First, the limiting instruction which listed all the possible other purposes mentioned in Rule 404(b), was so vague, ambiguous and confusing that it must have been meaningless to the jury.[585] Second, contrary to earlier cases, the State apparently did not identify any specific issue on which the evidence was relevant, nor did the trial judge perform a Rule 403 balancing. Evidence of the identical prior act carries great prejudice. Third, there does not appear to have been any evidence that Bradford inflicted the earlier injuries. This is contrary to *Lester v. State*,[586] which held that it must be proven that the defendant committed the earlier acts before that evidence becomes relevant.[587]

Webster v. State[588]

Webster was convicted of murder in the stabbing death of the victim.[589] Webster claimed it was an accident.[590] The State offered evidence of a fight between the two a year before the killing; the defendant objected.[591] The trial judge did a Rule 403 balancing and admitted the evidence to prove intent and motive.[592] The supreme court approved the admission of the evidence, but held that the trial court erred in failing to give a limiting instruction as required by standing precedent.[593] Reversing on other grounds, the court found the error was harmless because of the overwhelming proof of guilt.[594]

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[583] *Id.* ¶¶ 11-12, 759 So. 2d at 437.
[584] *Id.* ¶ 12, 759 So. 2d at 437.
[585] *See id.* ¶¶ 9, 12, 759 So. 2d at 437.
[586] 692 So. 2d 755 (Miss. 1997).
[587] *Lester*, 692 So. 2d at 782-83; *see supra* note 483 and accompanying text.
[588] 97-CT-00996-SCT, 754 So. 2d 1232 (Miss. 2000).
[589] *Webster*, ¶¶ 3-5, 754 So. 2d at 1233.
[590] *Id.* ¶¶ 12-13, 754 So. 2d at 1236-37.
[591] *Id.* ¶¶ 14-16, 754 So. 2d at 1238-39.
[592] *Id.*
[593] *Id.* ¶¶ 14-22, 754 So. 2d at 1238-40.
[594] *Id.* ¶¶ 22-23, 754 So. 2d at 1240-41.

Scruggs v. State[595]

Just before Scruggs was arrested for possession with intent to sell, he made a sale to two undercover agents.[596] The trial judge allowed into evidence the sale to the agents on the issue of intent, and gave a limiting instruction that the evidence was not to be considered on his guilt of this crime.[597] However, the trial judge exposed the jury to the entire litany of "other purposes" mentioned in Rule 404(b).[598] The defense made no objection to the instruction.[599] Scruggs was then convicted as a habitual criminal and the court of appeals affirmed.[600] The appellate court observed the breadth of the instruction and implied that the instruction should have been narrowed to direct consideration of the evidence only on the issue of intent.[601] However, absent objection, there was no error.[602]

Bishop v. State[603]

Bishop was convicted of three counts of misdemeanor larceny by false pretenses.[604] Bishop had signed three charge slips on the charge account of his neighbor at a gas station.[605] Bishop claimed his neighbor authorized him to do this in payment of a debt, but the neighbor denied this allegation.[606] The State was allowed to prove that Bishop had signed an additional nineteen charge slips.[607] Bishop's attorney objected and requested either a mistrial or a limiting instruction.[608] The trial judge performed a Rule 403 balancing analysis and decided that the other instances of false pretenses were more probative

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[595] 1998-KA-01344-COA, 756 So. 2d 817 (Miss. Ct. App. 2000).
[596] *Scruggs*, ¶¶ 2-4, 756 So. 2d at 819.
[597] *Id.* ¶¶ 10-14, 756 So. 2d at 820-21.
[598] *Id.* ¶ 14, 756 So. 2d at 821.
[599] *Id.*
[600] *Id.* ¶¶ 1, 26, 756 So. 2d at 819, 823.
[601] *Id.* ¶ 14, 756 So. 2d at 821.
[602] *Id.*
[603] 98-KM-00343-COA, 761 So. 2d 894 (Miss. Ct. App. 2000).
[604] *Bishop*, ¶ 1, 761 So. 2d at 896.
[605] *Id.* ¶ 2, 761 So. 2d at 896.
[606] *Id.* ¶ 3, 761 So. 2d at 897.
[607] *Id.* ¶ 10, 761 So. 2d at 898.
[608] *Id.* ¶ 13, 761 So. 2d at 898.

than they were prejudicial.[609] The trial court did not state the relevancy of the other crimes and did not give the limiting instruction.[610] The court of appeals acknowledged that, normally, an objection to Rule 404(b) evidence raises the Rule 403 issue and the right to a limiting instruction.[611] Here, however, the court of appeals found that the evidence did not prejudice the defendant because the other evidence of guilt was so overwhelming, making the failure to give the instruction harmless error.[612]

Wilhite v. State[613]

Wilhite was convicted of murder.[614] The State's theory was that Wilhite shot the victim in order to rob him.[615] The victim had $4500 on him when he was found dead, but the evidence suggested he might have had more money.[616] In her confessions, Wilhite told of her financial plight; she said she had forged checks in the past because she had desperately needed money.[617] This confession was allowed into evidence after the trial judge balanced the probative value of the testimony against its prejudice and decided it was more probative on her motive than it was prejudicial.[618] The judge offered to give a limiting instruction if the defense would submit one, which the defendant did not do.[619] The court of appeals held that there was error in failing to give the limiting instruction, but that it was harmless.[620] The "other crimes" evidence was so dissimilar to the charge of murder that there was no danger

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[609] *Id.* ¶ 14, 761 So. 2d at 898.
[610] *Id.* ¶ 13, 761 So. 2d at 898.
[611] *Id.*
[612] *Id.*
[613] 98-KA-01126-COA, 791 So. 2d 231 (Miss. Ct. App. 2001); *see infra* notes 879-83 and accompanying text for a discussion of another evidentiary issue of this case.
[614] *Wilhite*, ¶ 2, 791 So. 2d at 235.
[615] *Id.* ¶ 3, 791 So. 2d at 236.
[616] *Id.*
[617] *Id.* ¶ 3, 791 So. 2d at 235-36.
[618] *Id.* ¶ 4, 791 So. 2d at 236.
[619] *Id.* ¶ 8, 791 So. 2d at 237.
[620] *Id.*

of confusion or of misleading the jury.[621]

5. A Question of Admissibility or Conditional Relevancy Under Rule 104?

In only one case has the Mississippi Supreme Court addressed whether the preliminary decision about admitting other crimes or acts of the defendant is a question of admissibility under Rule 104(a) with factual decisions made by the judge, or of conditional relevancy under R. 104(b) with factual decisions made by the jury. In *Lester v. State*,[622] the court almost offhandedly, and without citing authority, stated that evidence of other crimes, wrongs or acts must be supported by evidence sufficient to support a finding, not necessarily by a preponderance, that the defendant did the acts.[623] This is the test under Rule 104(b) for conditional relevancy. The Mississippi Supreme Court was in good company. The United States Supreme Court, twelve years earlier, held that evidence of other thefts was admissible to show a defendant's knowledge and intent regarding stolen goods he was selling, on a showing sufficient to support a finding by a preponderance of the evidence that the defendant committed the other acts under Federal Rule of Evidence 104(b).[624]

It probably does not make any difference as a matter of potential legal error on appeal if admitting "other crimes" is a question of admissibility under Mississippi Rule of Evidence 104, 104(a) or 104(b). If a judge follows the analytical reasoning process required for Rule 403 balancing, then the judge must decide that the supporting evidence is sufficient to support a finding in order to allow the jury to hear the evidence of the other crime or act.

It is suggested though that this process presents quintessential questions of admissibility under Rule 104(a). These decisions are much more akin to a judge deciding if a conspiracy existed before allowing a co-conspirator's statement into

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[621] *Id.*

[622] 692 So. 2d 755 (Miss. 1997).

[623] *Lester*, 692 So. 2d at 782-83.

[624] Huddleston v. United States, 485 U.S. 681, 689 (1988).

evidence, or deciding if the required predicate has been shown before admitting hearsay under an exception. The judge first must decide if there is an issue in factual dispute upon which the other crime or act might be relevant. Then the judge must decide if the other crime or act logically serves as proof on that issue, if the evidence is needed in light of other available evidence and the other balancing factors, if the evidence that the defendant committed the other crime or act is believable enough to meet the clear and convincing burden of proof, and finally, if the prejudice is outweighed by the probative value of the evidence. All of these considerations are factual decisions. The ultimate conclusion is not as simple as just deciding whether a juror could believe that the defendant committed the other crime or act, and subsequently allowing it into evidence if that threshold is reached. The judge must internally and personally believe that the evidence is strong enough to show that the defendant probably did commit the other crime or act before concluding that it has any probative value to be balanced against the presumed prejudice. Obviously, the jury can regard, or disregard, the evidence if the judge admits it. Perhaps it can be said that this makes it a mixed question under both Rule 104(a) and Rule 104(b).

6. Advance Rulings—"Chilling Effect" of Ruling or Not Ruling in Advance

Sometimes defendants move for pre-trial rulings on the admissibility of "other crimes" evidence which the State may offer if the defendant decides to testify. If the trial judge refuses to so rule, the defendant may choose not to testify and then on appeal claim that he was "chilled" by the threat that the evidence would be admitted. The Mississippi Supreme Court has encouraged trial judges to make such advanced rulings, but held that it is discretionary, expressing an understanding that the judge may need the context provided by the trial in order to properly rule. The court has hinted, however, that discretion may be abused.[625] So far, a refusal to rule in advance of the

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[625] *See* Settles v. State, 584 So. 2d 1260 (Miss. 1991); *see infra notes* 639-47

offering of the evidence has not been held to be harmless error.

A defendant may be similarly "chilled" from testifying by an advanced ruling that the State's "other crimes" evidence will be admissible if the defendant takes the stand. In these cases, the defendant often argues on appeal that the judge erred in ruling the evidence admissible, and thus kept him or her from testifying. The strongest argument in support of this "chilling effect" is that the ruling prevented the defendant from presenting evidence in his defense, thus depriving him of due process and a fair trial. This was successfully argued in *Darby v. State*,[626] where the trial judge ruled in advance that the defendant's past criminal record would be admissible if he testified that he was a confidential informant for the police.[627] He therefore did not testify, and the supreme court held that the ruling denied him the due process right to present a defense.[628]

CASES:

Darby v. State[629]

Darby was convicted of aggravated assault (shooting) while claiming self-defense.[630] Darby wanted to testify that he was a police informer, that he knew the victim was involved in a food stamp scam, and that the victim knew Darby was an informer.[631] Darby could also show that the victim had once shot between Darby's legs, had threatened Darby, and had a gun on his person when the shooting in the present case occurred.[632] Without stating reasons, the trial judge told Darby's lawyer that if Darby brought up the matter of being an

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and accompanying text.

[626] 538 So. 2d 1168 (Miss. 1989); *see infra* notes 629-38 and accompanying text.

[627] *Darby*, 538 So. 2d at 1172.

[628] *Id.* at 1265.

[629] 538 So. 2d 1168 (Miss. 1989); *see supra* notes 35-42, 464-68 and accompanying text for a recitation of the facts and discussion of other evidentiary issues of this case.

[630] *Darby*, 538 So. 2d at 1171.

[631] *Id.* at 1173.

[632] *Id.* at 1172.

informer, the State could then go into Darby's prior crimes, of which he was not convicted.[633] Apparently the judge thought that showing Darby was an informer put his character into issue, exposing him to cross on his prior unconvicted crimes.[634] Thus "chilled," Darby did not testify to being an informer or of the victim's knowledge of that fact, all of which would have supported his claim of justifiable fear of the victim.[635] Darby claimed on appeal that he was prevented from his due process right to present his defense by the erroneous ruling.[636] The supreme court agreed, observing that the trial judge had ruled without stating reasons.[637] The supreme court recited this exclusionary rule and held that the judge erred in ruling that Darby's prior crimes would be admissible, thereby depriving Darby of the substantial right to present evidence in his defense.[638]

Settles v. State[639]

Settles was convicted of armed robbery.[640] Before trial, Settles asked for a ruling as to whether, if he testified, his extensive criminal record could be used to impeach him.[641] The trial judge refused to make an advanced ruling, citing only the unfairness to the State in having to reveal its intentions.[642] Settles chose not to testify and on appeal claimed error in the refusal to give an advanced ruling.[643] The supreme court reviewed cases from around the country in addition to its own precedent.[644] The court observed that an advanced ruling is a matter in the discretion of the trial judge, but strongly urged that trial courts make advanced rulings unless there is

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633 *Id.*
634 *Id.* at 1173.
635 *Id.* at 1173-74.
636 *Id.* at 1174.
637 *Id.* at 1173.
638 *Id.* at 1172-73.
639 584 So. 2d 1260 (Miss. 1991).
640 *Settles*, 584 So. 2d at 1261.
641 *Id.* at 1262.
642 *Id.*
643 *Id.*
644 *Id.* at 1262-64.

good reason not to do so.[645] At the very least, the judge can rule on the prior convictions that are clearly inadmissible or are admissible.[646] The supreme court held that the trial judge abused his discretion, but did not reverse since the defendant failed to preserve the error.[647]

Wilcher v. State[648]

Wilcher was convicted of murder and sentenced to death.[649] At trial, Wilcher had moved *in limine* to exclude evidence of his prior bad acts under Rule 404(b).[650] The trial judge refused to rule in advance, preferring to wait for the context of the other evidence when it was offered.[651] Apparently, the evidence was not offered, but Wilcher claimed that he was "chilled" from testifying by the refusal to rule.[652]

This ruling was affirmed.[653] The supreme court restated that trial judges are encouraged to rule in advance, although the decision is discretionary.[654] Rule 404(b) evidence may be offered for a variety of purposes, depending on what is disputed at trial, and it is discretionary as to whether the judge makes an advanced ruling.[655]

7. Waiver of Error

These cases show that the appellate courts are quick to find that error was waived, not preserved under Rule 103, when counsel does not object, or when the defendant is "chilled" from testifying by an advanced ruling but does not make an offer of proof of what that testimony would have been.

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[645] *Id.* at 1265.

[646] *Id.*

[647] *Id.* Error was not preserved because the defense did not make an offer of the proof Settles would have given had he testified. *Id.* The supreme court therefore could not determine if the error was prejudicial. *Id.*

[648] 697 So. 2d 1087 (Miss. 1997).

[649] *Wilcher*, 697 So. 2d at 1091.

[650] *Id.* at 1093.

[651] *Id.* at 1093-94.

[652] *Id.* at 1095.

[653] *Id.*

[654] *Id.*

[655] *Id.* at 1094.

CASES:

Clanton v. State[656]

Clanton was convicted of rape.[657] He used a gun to force his victim to submit to the rape.[658] An in-law of Clanton's was called to identify the gun as the in-law's own and was twice asked if Clanton had permission to take the gun from his house, to which the witness responded "no."[659] No objections were made to the questions, but later the defense counsel moved for a mistrial, which was overruled.[660] The supreme court held that the defense waived any error by failing to object.[661]

Lambert v. State[662]

At the trial leading to Lambert's rape conviction, the State was permitted to present expert testimony to the effect that the victim, Lambert's early-teenage step-daughter, had been sexually active for years.[663] The girl testified that she was forced to have sex with Lambert countless times over a span of six years.[664] There was no objection to the State's experts testimony, and it was held that any error was waived.[665]

Settles v. State[666]

Willie v. State[667]

In Willie's murder trial, the trial court allowed the sheriff to testify that, when arrested, Willie was driving an unlicensed

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[656] 539 So. 2d 1024 (Miss. 1989).
[657] *Clanton*, 539 So. 2d at 1025.
[658] *Id.*
[659] *Id.* at 1027.
[660] *Id.*
[661] *Id.*
[662] 574 So. 2d 573 (Miss. 1990).
[663] *Lambert*, 574 So. 2d at 575.
[664] *Id.* at 574.
[665] *Id.* at 575.
[666] 584 So. 2d 1260 (Miss. 1991); *see supra* notes 639-47 and accompanying text for a recitation of the facts and discussion of this case.
[667] 585 So. 2d 660 (Miss. 1991).

car.[668] This decision was affirmed by the supreme court since the evidence was relevant for identification because it linked Willie to the car which had been seen at the murder scene.[669] On four other occasions during the trial, references were made to Willie having committed other crimes, but no objections were made.[670] The errors were therefore waived.[671]

Conner v. State[672]

In Conner's murder trial, in which he was convicted, the State cross-examined Conner about a prior incident where he had allegedly displayed a knife.[673] The State apparently had no evidence of the incident, but the error was waived for lack of an objection.[674]

Eakes v. State[675]

Eakes was convicted of two counts of sexual battery and one count of attempted sexual battery.[676] The victim was nine years-old at the time of trial.[677] One witness testified that Eakes had previously exposed himself to her and her child.[678] Eakes claimed on appeal that this evidence of "other bad acts" should have been excluded under Rule 404(b), but no objection was made at trial.[679] Any error was held to have been waived.[680]

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[668] *Willie*, 585 So. 2d at 678-79.
[669] *Id.* at 679.
[670] *Id.* at 678-79.
[671] *Id.* at 679.
[672] 632 So. 2d 1239 (Miss. 1993); *see infra* notes 778-83 and accompanying text for a discussion of another evidentiary issue of this case.
[673] *Conner*, 632 So. 2d at 1274.
[674] *Id.*
[675] 665 So. 2d 852 (Miss. 1995).
[676] *Eakes*, 665 So. 2d at 857.
[677] *Id.* at 858.
[678] *Id.* at 868.
[679] *Id.*
[680] *Id.*

Smith v. State[681]

Smith was convicted of capital murder of a liquor store owner and sentenced to death.[682] A woman testified that the defendant, with his accomplice, had her in their car where they hit her with a pistol, threatened her with a knife and forced her to strip before pushing her out of their car.[683] The defense did not object to this testimony, and the supreme court cited this failure as one ground for affirmance.[684] The appellate court went on to hold that the evidence was nevertheless admissible under Rule 404(b) because it was the basis for the woman to be able to identify the gun and knife which were later found and offered into evidence.[685] This evidence of "other crimes" was thus relevant for the other purpose of showing opportunity, preparation, plan, knowledge and identity.[686]

Hobson v. State[687]

Hobson was sentenced to life for murder.[688] At trial, an officer was asked if Hobson was told of the charges against him.[689] The officer made a brief reference to a then pending assault charge against Hobson.[690] The prosecutor quickly corrected the officer to refer to the murder charges.[691] The defendant's motion *in limine* concerning the evidence of the prior assault was never ruled on before trial, and the objection to this evidence was never ruled on either.[692] The supreme court noted that this failure to obtain rulings waived any error.[693] The court went on to rule that the mistaken reference to the assault charge had not been sought by the prosecutor

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[681] 93-DP-00821-SCT, 724 So. 2d 280 (Miss. 1998).
[682] *Smith*, ¶¶ 2-3, 724 So. 2d at 290.
[683] *Id.* ¶ 12, 724 So. 2d at 291.
[684] *Id.* ¶ 127, 724 So. 2d at 313.
[685] *Id.* ¶ 131, 724 So. 2d at 314.
[686] *Id.*
[687] 97-KA-00475-SCT, 730 So. 2d 20 (Miss. 1998).
[688] *Hobson*, ¶ 1, 730 So. 2d at 22.
[689] *Id.* ¶ 8, 730 So. 2d at 23.
[690] *Id.*
[691] *Id.* ¶ 8, 730 So. 2d at 23-24.
[692] *Id.*
[693] *Id.* ¶ 9, 730 So. 2d at 24.

and, in view of other evidence, it was not prejudicial.[694]

Another witness, while being cross-examined by the defense, volunteered a reference to Hobson using drugs.[695] This was held not to be prejudicial because the judge sustained an objection to the testimony and instructed the jury not to consider the statement.[696]

Washington v. State[697]

Washington was convicted of robbery for a purse snatching incident.[698] An officer testified that he had spoken to Washington over the phone and had, after the robbery, pulled him over one night.[699] The trial judge overruled the motion for a mistrial, and defense counsel rejected an offered limiting instruction.[700] The conviction was affirmed.[701] The court of appeals held that there was no evidence of "other crimes" in the officer's testimony because the officer did not get to explain why he had pulled Washington over.[702] The victim also testified to the defendant stalking her and making rude phone calls to her, but there was no objection to relevancy.[703] Any error was therefore waived.[704]

8. Saving Error—Sustained Objections/Admonishing Jury

If the trial judge catches the improper injection of "other crimes" evidence at trial, sustains an objection and admonishes the jury to disregard it, the appellate courts are inclined to hold that there was no prejudice and therefore no error.

CASES:

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[694] *Id.* ¶ 10, 730 So. 2d at 24.
[695] *Id.* ¶ 16, 730 So. 2d at 25.
[696] *Id.* ¶ 17, 730 So. 2d at 25.
[697] 2000-KA-00204-COA, 794 So. 2d 253 (Miss. Ct. App. 2001).
[698] *Washington*, ¶ 1, 794 So. 2d at 256.
[699] *Id.* ¶ 12, 794 So. 2d at 259.
[700] *Id.* ¶ 13, 794 So. 2d at 260.
[701] *Id.* ¶ 16, 794 So. 2d at 260.
[702] *Id.* ¶ 13, 794 So. 2d at 260.
[703] *Id.* ¶ 15, 794 So. 2d at 260.
[704] *Id.*

Perkins v. State[705]

Perkins shot her boyfriend who was abusing her, and was subsequently convicted of murder.[706] An eyewitness testified that the victim had told him that Perkins had killed two other people.[707] The defendant objected and moved for a mistrial.[708] The judge sustained the objection, instructed the jury to disregard the testimony, and denied the mistrial.[709] This decision was affirmed by the supreme court.[710] No prejudice results when the judge sustains the objection and directs the jury to disregard it.[711]

Criddle v. State[712]

Criddle was convicted of manslaughter and claimed error in the district attorney asking one of the defense witnesses if that witness was under federal indictment.[713] The trial judge sustained the objection and admonished the jury to disregard the question.[714] This was held by the supreme court to have removed any prejudice.[715] The court observed that the only time a sustained objection and admonishment would not avoid prejudice is when the comment or question is so blatantly and clearly prejudicial that the instruction of the court would not ordinarily remove it from the minds of the jurors.[716]

Crosswhite v. State[717]

Crosswhite was convicted of manufacturing methamphetamine by boiling Vicks inhalers.[718] He was caught in the act

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[705] 600 So. 2d 938 (Miss. 1992).
[706] *Perkins*, 600 So. 2d at 939.
[707] *Id.* at 940.
[708] *Id.* at 941.
[709] *Id.*
[710] *Id.*
[711] *Id.*
[712] 633 So. 2d 1047 (Miss. 1994).
[713] *Criddle*, 633 So. 2d at 1048.
[714] *Id.*
[715] *Id.*
[716] *Id.*
[717] 97-KA-00148-SCT, 732 So. 2d 856 (Miss. 1999).
[718] *Crosswhite*, ¶¶ 2-3, 732 So. 2d at 857-58.

of boiling them and extracting the drug.[719] A witness, testifying to the probable cause for searching the house, volunteered that Crosswhite had told her he knew how to extract the drug.[720] The witness further explained that she had done drugs with Crosswhite before.[721] Counsel did not object then, but did so at the end of the direct exam and moved for a mistrial.[722] The trial judge sustained the objection, admonished the jury, and polled the jury for their agreement that they could disregard the comment.[723] This procedure was affirmed, the supreme court noted that the judge had assured no serious prejudice would occur from the mention of the other crime.[724]

Forbes v. State[725]

Two defendants were tried together for armed robbery and aggravated assault in a liquor store robbery.[726] A pager was lost by one of the defendants during the commission of the crime.[727] One of the defendants, Forbes, testified that he saw his accomplice's pager fall on the ground during the robbery.[728] Obviously Forbes and his accomplice were at cross purposes in the trial. When the accomplice testified, he made reference to Forbes having committed acts of stealing in the past.[729] The trial judge sustained the objection and instructed the jury to disregard the accomplice's comment.[730] This ruling was affirmed by the court of appeals.[731] Forbes argued that his accomplice's testimony was inflammatory and prejudicial, requiring a mistrial.[732] The appellate court approved the han-

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[719] *Id.* ¶ 3, 732 So. 2d at 858.
[720] *Id.* ¶ 12, 732 So. 2d at 860.
[721] *Id.*
[722] *Id.* ¶ 13, 732 So. 2d at 860.
[723] *Id.* ¶ 13, 732 So.2 d at 860-61.
[724] *Id.* ¶ 15, 732 So. 2d at 861.
[725] 98-KA-00498-COA, 771 So. 2d 942 (Miss. Ct. App. 2000).
[726] *Forbes*, ¶ 1, 771 So. 2d at 945.
[727] *Id.* ¶ 2, 771 So. 2d at 945.
[728] *Id.* ¶ 47, 771 So. 2d at 954.
[729] *Id.* ¶ 29, 771 So. 2d at 951.
[730] *Id.* ¶ 31, 771 So. 2d at 952.
[731] *Id.* ¶ 34, 771 So. 2d at 952.
[732] *Id.* ¶ 32, 771 So. 2d at 952.

dling of the issue as removing any inflammatory effect.[733]

Reed v. State[734]

In this rape trial, an officer, while testifying, volunteered that he understood that the defendant had been previously convicted of a sexual offense.[735] The trial judge immediately stopped the officer, instructed the jury not to consider the testimony, and polled the jury.[736] On appeal, the defendant claimed a mistrial should have been granted *sua sponte,* without an objection.[737] This motion was denied.[738] The court of appeals stated that a trial judge is in the best position to decide whether inadmissible information will so prejudice the defendant that a mistrial should be declared.[739] There was no abuse of discretion found here.[740]

Crawford v. State[741]

Crawford was convicted of the aggravated assault of a woman.[742] A witness for the State was another woman who was crossed about an incident between herself and Crawford on the same day as the alleged assault in question in this trial.[743] On re-direct, the witness was asked what Crawford did to her, and she replied Crawford had raped her.[744] The trial judge immediately sustained an objection to the testimony and admonished the jury, but denied the motion for a mistrial.[745] This ruling was affirmed by the supreme court.[746] The re-direct concerned the incident raised on cross.[747] The actions of

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[733] *Id.*
[734] 98-KA-01802-COA, 764 So. 2d 511 (Miss. Ct. App. 2000).
[735] *Reed*, ¶ 8, 764 So. 2d at 513.
[736] *Id.*
[737] *Id.* ¶ 9, 764 So.2 d at 513-14.
[738] *Id.* ¶ 14, 764 So. 2d at 515.
[739] *Id.* ¶ 12, 764 So. 2d at 514.
[740] *Id.* ¶ 13, 764 So. 2d at 514.
[741] 98-KA-01682-SCT, 787 So. 2d 1236 (Miss. 2001).
[742] *Crawford*, ¶ 1, 787 So. 2d at 1238.
[743] *Id.* ¶ 9, 787 So. 2d at 1240.
[744] *Id.*
[745] *Id.* ¶ 34, 787 So. 2d at 1244.
[746] *Id.*
[747] *Id.*

the trial judge were deemed adequate by the appellate court to remove any unfair prejudice.[748]

Cox v. State[749]

Before the armed robbery trial of the defendant, the trial court had ruled *in limine* that the State could not show that an officer had found a crack pipe in the defendant's car when he was arrested.[750] The prosecutor forgot to tell the officer, and the officer mentioned it on direct when questioned.[751] The judge sustained the objection, instructed the jury to disregard the testimony, and polled the jury to the effect that they would have to disregard the mention of the pipe.[752] Satisfied with the polling, the trial judge overruled the motion for a mistrial.[753] This ruling was affirmed by the supreme court.[754] The trial judge was in the best position to decide if the defendant would be prejudiced, and did not abuse his discretion in overruling the motion.[755]

B. Rule 404(b)-Listed Other Purposes:

1. Motive

Proving motive by showing other crimes or bad acts is one of the more straightforward uses of such evidence. Typical are the cases in which a defendant is charged with killing or intimidating a person who was a witness against him in another criminal case, thus showing that the defendant had been charged with another crime in the past. This relates closely to showing crimes committed in covering up another crime. Sometimes, the evidence shows crimes committed by the spouse or a relative of the defendant to demonstrate why the defendant was motivated to do what he or she did. Proving gang member-

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[748] *Id.*
[749] 99-KA-01014-SCT, 793 So. 2d 591 (Miss. 2001).
[750] *Cox*, ¶ 7, 793 So. 2d at 594.
[751] *Id.*
[752] *Id.* ¶ 12, 793 So. 2d at 595.
[753] *Id.*
[754] *Id.*
[755] *Id.*

ship shows the motive for shooting a member of a rival gang. Sometimes defendants attempt to show the bad conduct of the victim, or other person, to prove the defendant was justified in committing the crime. Ordinarily, the bad conduct of the victim is not justification for the defendant's crime.

When the general motive is obvious then other crimes which show the underlying specific reason for the robbery, such as getting the money to buy drugs, is not very probative, and the prejudicial effect is high.

CASES:

Lockett v. State[756]

These two cases were appeals from separate trials in which Lockett was convicted of murdering a husband and wife.[757] In both trials, the State was allowed to show the killing of the other spouse.[758] This was affirmed because the two killings were so closely related as to be part of an interconnected transaction.[759] In the trial for the murder of the wife, who was the second victim, the supreme court regarded proof of the husband's murder as relevant to the defendant's motive in the second killing; covering up that first murder by silencing her.[760]

Haynes v. State[761]

Hunt v. State[762]

Hunt was convicted of murdering an attorney who had represented him in the past.[763] The State was allowed to

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[756] 517 So. 2d 1317 (Miss. 1987) (*Lockett I*); 517 So. 2d 1347 (Miss. 1987) (*Lockett II*).

[757] *Lockett I*, 517 So. 2d at 1320; *Lockett II*, 517 So. 2d at 1348.

[758] *Lockett I*, 517 So. 2d at 1321; *Lockett II*, 517 So. 2d at 1348.

[759] *Lockett I*, 517 So. 2d at 1320; *Lockett II*, 517 So. 2d at 1355.

[760] *Lockett II*, 517 So. 2d at 1355.

[761] 520 So. 2d 1367 (Miss. 1988); *see supra* notes 513-17 and accompanying text for a recitation of the facts and discussion of this case.

[762] 538 So. 2d 422 (Miss. 1989).

[763] *Hunt*, 538 So. 2d at 422-23.

prove that Hunt abused alcohol and drugs, that he had been prosecuted for DUI, and that he told a man he had to get out of town.[764] This was connected-up by evidence showing that Hunt was dissatisfied with the victim's representation of him on legal matters.[765] This was affirmed by the supreme court as relevant to show Hunt's motive for shooting the victim.[766]

Hogan v. State[767]

Hogan was convicted of aggravated assault in shooting several patrons in front of a night club.[768] The trial judge denied Hogan's motion to exclude evidence that earlier in the night her husband had gone to the night club to buy drugs and, while there, was beaten and robbed.[769] This ruling was affirmed.[770] The evidence did not connect Hogan to the earlier drug transaction and was therefore not prejudicial, but it was relevant to show her motive for the shootings.[771]

Lesley v. State[772]

Lesley and her codefendant boyfriend were convicted of conspiracy to murder Lesley's husband.[773] The husband was permitted to testify of his suspicions that Lesley had adulterous affairs with two other men some six years before this alleged crime.[774] The trial judge allowed the husband's testimony on the issue of motive.[775] This was reversed by the supreme court.[776] The events were too remote to be probative of motive for this crime, and the testimony amounted only to suspicion, not credible proof of those affairs.[777]

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[764] *Hunt*, 538 So. 2d at 425-26.
[765] *Id.* at 426.
[766] *Id.*
[767] 580 So. 2d 1275 (Miss. 1991).
[768] *Hogan*, 580 So. 2d at 1276.
[769] *Id.* at 1277-78.
[770] *Id.* at 1278.
[771] *Id.*
[772] 606 So. 2d 1084 (Miss. 1992).
[773] *Lesley*, 606 So. 2d at 1085.
[774] *Id.* at 1089.
[775] *Id.*
[776] *Id.* at 1090.
[777] *Id.*

Conner v. State[778]

In Conner's murder trial, the State was permitted to show that Conner had been using cocaine at the time of the victim's death.[779] The State argued that it was admissible to show Conner had a pecuniary motive for killing the victim; that was, to get money to buy cocaine.[780] Conner was shown to be destitute before the killing, and was shown to have money subsequent.[781] This was affirmed by the supreme court as a proper use of "other crimes" evidence to show motive.[782]

Mack v. State[783]

In this capital murder case, the trial court admitted into evidence the fact that the defendant led a police chase in an attempt to escape arrest.[784] At the time, in addition to being a suspect of the murder, Mack was an escapee and driving a stolen pickup.[785] No flight instruction was sought or given.[786] The supreme court reasoned that while flight might sometimes be evidence of guilt, where there are other reasons for the flight, the evidence should not be admitted because the natural jury inference will be of guilt of the crime charged.[787]

The trial court also allowed into evidence that Mack had smoked crack before the murder and was after money for more crack when he killed the victim.[788] The supreme court agreed with the trial court's findings that this evidence was relevant to the defendant's motive for the robbery and murder under Rule 404(b), but perhaps should have been excluded as unduly

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[778] 632 So. 2d 1239 (Miss. 1993); *see supra* notes 672-74 and accompanying text for a discussion of another evidentiary issue of this case.

[779] *Conner*, 632 So. 2d at 1273-74.

[780] *Id.* at 1274.

[781] *Id.*

[782] *Id.*

[783] 650 So. 2d 1289 (Miss. 1994); *see infra* notes 1499-500 and accompanying text for a discussion of another evidentiary issue of this case.

[784] *Mack*, 650 So. 2d at 1308.

[785] *Id.*

[786] *Id.* at 1309-10.

[787] *Id.* at 1310.

[788] *Id.* at 1311.

prejudicial.[789] The appellate court observed that robbery has its own motive, getting something of value, so the underlying reason for the robbery becomes less probative.[790]

However, the error regarding the flight evidence and the possible error regarding the crack smoking were held to be harmless in view of the overwhelming weight of all the other evidence.[791]

Hoops v. State[792]

Hoops, a seventeen-year-old gang member, was convicted of shooting a member of another gang.[793] The State was allowed to prove that Hoops was a member of a gang which was a rival to the victim's gang.[794] The supreme court affirmed this ruling as being relevant to prove motive.[795] The court specifically dealt with the issue of whether being in a gang is to be considered a "crime, wrong or act" which may be introduced under Rule 404(b).[796] The court concluded that it was an "act" and, as such, relevant to Hoops's motive.[797]

Hunt v. State[798]

Hunt was convicted of murdering her husband.[799] Hunt's codefendant boyfriend pled to manslaughter.[800] The State was allowed to prove that Hunt was having the affair with her boyfriend and another man, and was saying that she would like to see her husband dead.[801] These acts were held to be admissible under Rule 404(b) to prove motive.[802]

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[789] *Id.* at 1313.
[790] *Id.*
[791] *Id.* at 1310, 1313.
[792] 681 So. 2d 521 (Miss. 1996).
[793] *Hoops*, 681 So. 2d at 524.
[794] *Id.* at 529.
[795] *Id.* at 531.
[796] *Id.* at 529-30.
[797] *Id.* at 530.
[798] 687 So. 2d 1154 (Miss. 1996).
[799] *Hunt*, 687 So. 2d at 1157.
[800] *Id.* at 1159.
[801] *Id.* at 1163.
[802] *Id.*

Lester v. State[803]

The State was allowed to show that the defendant "ran the streets."[804] This was held admissible to show motive—that the defendant was angry with the baby because he had to stay home and take care of her and could not "run the streets."[805]

Pleasant v. State[806]

Pleasant, a seventeen-year-old, was found guilty of capital murder after his thirteen-year-old codefendant pled guilty.[807] The State was permitted to show that Pleasant was involved in gang activity and had facial tattoos associated with his gang.[808] The supreme court affirmed the ruling, observing that such evidence may be admitted under Rule 404(b) to show motive, opportunity, intent, preparation and plan.[809] The court did not identify the specific issue to which the evidence was relevant.[810]

Note: This evidence only has the prejudicial effect prohibited by Rule 404(b) of inferring that since the defendant was a gang member, he did gang-like things. There did not appear to be a dispute over motive, intent, identity or plan or preparation. It is hard to imagine what "other purpose" the evidence was offered for.

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[803] 692 So. 2d 755 (Miss. 1997); *see supra* notes 74-79, 232-35, 482-84 and accompanying text for a recitation of the facts and discussion of other evidentiary issues of this case; *infra* notes 1142-45 and accompanying text for a discussion of another evidentiary issue of this case.

[804] *Lester*, 692 So. 2d at 779.

[805] *Id.*

[806] 95-KA-00737-SCT, 701 So. 2d 799 (Miss. 1997).

[807] *Pleasant*, ¶¶ 2-3, 701 So. 2d at 800.

[808] *Id.* ¶ 20, 701 So. 2d at 804.

[809] *Id.* ¶ 21, 701 So. 2d at 804.

[810] *Id.*

Edwards v. State[811]

Edwards and his former girlfriend had a daughter with whom Edwards had visitation rights.[812] At a time when Edwards's wife had custody of the girl, she told Edwards that she was having sex with other men, using drugs and drinking.[813] With a friend, Edwards went to her home, kicked in the door, beat up her date, and forced him into a car where he was held for a few minutes before escaping.[814] For this incident, Edwards was convicted of burglary and kidnapping.[815] The trial judge excluded Edwards' offer of evidence of the bad conduct of his former girlfriend.[816] The defense argued this ruling was error, contending that it was admissible under Rule 404(a)(2) to show that Edwards' intent and motive for going to the house was to protest about the conditions in which their child was being raised.[817]

The court of appeals affirmed.[818] With a confusing bit of reasoning, the court held that the evidence did not show that Edwards was on a rescue mission of the daughter, but only showed his rage, and therefore was not relevant.[819] Since there was other evidence of the mother's drug use, additional evidence of her bad character was not needed.[820]

Note: The mother was not the victim of the kidnapping; she was the victim of the burglary. Though not clearly stated by the court of appeals, this is the reason her character as a victim was an issue. The court could have made things more clear by just holding that her bad conduct was not relevant to his breaking and entering.

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[811] 97-KA-10562-COA, 726 So. 2d 274 (Miss. Ct. App. 1998); *see infra* notes 964-66 and accompanying text for a discussion of another evidentiary issue of this case.

[812] *Edwards*, ¶ 2, 726 So. 2d at 275.

[813] *Id.* ¶ 13, 726 So. 2d at 277.

[814] *Id.* ¶ 3, 726 So. 2d at 275.

[815] *Id.* ¶ 1, 726 So. 2d at 275.

[816] *Id.* ¶ 13, 726 So. 2d at 277.

[817] *Id.* ¶ 16, 726 So. 2d at 277.

[818] *Id.* ¶ 21, 726 So. 2d at 278.

[819] *Id.* ¶ 17, 726 So. 2d at 277.

[820] *Id.* ¶ 18, 726 So. 2d at 278.

Burns v. State[821]

Burns was sentenced to death for armed robbery and murder.[822] Burns's codefendant testified that Burns told him that he killed the robbery victim because he did not want to go back to jail.[823] Burns argued that this testimony suggested prior crimes committed by him.[824] The conviction was affirmed by the supreme court.[825] The evidence was admissible to prove defendant's motive.[826]

Saunders v. State[827]

Saunders was convicted of two counts of murder, having hired two men to kill a witness against him in a pending grand jury investigation.[828] The hitmen also killed the witness's niece, who happened to be at his house, because she knew one of the hitmen.[829] One of the hitmen testified that when Saunders met them on the coast to pay them, they had a friend with them.[830] Saunders told them to kill that friend.[831] At trial, Saunders objected to the introduction of this evidence as "other crimes" evidence, irrelevant to the present charge.[832] The court of appeals affirmed, reasoning that the evidence was relevant to prove Saunders's motive to avoid capture, and was also part of the interrelated events surrounding the murders.[833]

The district attorney testified at trial that the prior case against Saunders had to be dropped because of the death of the witness against him.[834] On cross, the district attorney was

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[821] 96-DP-01088-SCT, 729 So. 2d 203 (Miss. 1998).
[822] *Burns*, ¶¶ 1-2, 729 So. 2d at 208.
[823] *Id.* ¶ 78, 729 So. 2d at 220.
[824] *Id.*
[825] *Id.* ¶ 86, 729 So. 2d at 222.
[826] *Id.*
[827] 97-KA-00657-COA, 733 So. 2d 325 (Miss. Ct. App. 1998).
[828] *Saunders*, ¶¶ 1-2, 733 So. 2d at 327.
[829] *Id.* ¶ 3, 733 So. 2d at 327.
[830] *Id.* ¶ 19, 733 So. 2d at 330.
[831] *Id.*
[832] *Id.*
[833] *Id.* ¶¶ 22, 24, 733 So. 2d at 330, 331.
[834] *Id.* ¶ 25, 733 So. 2d at 331.

asked if Saunders would have been eligible for parole in two years if convicted of that charge, implying that Saunders would not have killed a witness just to avoid a two year sentence.[835] On redirect, the district attorney was asked if Saunders could have been paroled if charged as a habitual offender.[836] The district attorney answered in the negative.[837] On appeal, Saunders claimed a mistrial should have been declared because the jury became aware of his habitual status.[838] This was denied by the court of appeals.[839] The defense opened the door to questions about the punishment for the dropped charge, and the State was entitled to show the defendant had ample motive to dispose of that witness.[840]

Ott v. State[841]

Ott was convicted of intimidating two men who had been witnesses against him in a drug charge.[842] He was convicted of that drug charge before this trial.[843] The judge performed a Rule 403 balancing on the record, and ruled that evidence of the other drug charge and conviction was admissible to prove Ott's motive and intent in threatening the witnesses.[844] This ruling was affirmed by the court of appeals; the trial court's failure to give a limiting instruction *sua sponte* was found to be harmless error.[845]

Johns v. State[846]

Johns was convicted of assault for shooting into the car of the victim and injuring him.[847] The prosecution was permitted

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[835] *Id.*
[836] *Id.* ¶ 27, 733 So. 2d at 331.
[837] *Id.*
[838] *Id.* ¶ 26, 733 So. 2d at 331.
[839] *Id.* ¶ 27, 373 So. 2d at 331.
[840] *Id.* ¶ 28, 733 So. 2d at 331.
[841] 98-KA-00011-COA, 742 So. 2d 1197 (Miss. Ct. App. 1999).
[842] *Ott*, ¶ 1, 742 So. 2d at 1199.
[843] *Id.* ¶ 8, 742 So. 2d at 1201.
[844] *Id.* ¶ 10, 742 So. 2d at 1201.
[845] *Id.* ¶ 12, 742 So. 2d at 1202.
[846] 96-KA-01303-COA, 746 So. 2d 947 (Miss. Ct. App. 1999).
[847] *Johns*, ¶ 1, 746 So. 2d at 948.

to review in opening statement and then to prove that in the time period just before the shooting, the defendant had threatened the victim.[848] In part, these events arose because Johns' cousin had been charged with robbing a store at which the victim worked, and Johns believed the victim was a witness for the State against the cousin.[849] The prosecution was also allowed to show the charge against the cousin for the robbery.[850] These rulings were affirmed by the court of appeals.[851] The trial judge, after doing a Rule 403 balancing on the record, ruled that the other acts were probative of Johns motive and gave an appropriate limiting instruction.[852] The evidence concerning the store robbery made it clear that the cousin, not the defendant, was the charged party.[853] The evidence was probative of motive and therefore properly admitted.[854]

Sykes v. State[855]

Sykes was convicted of burglary, largely on his confession in which he stated that he had smoked cocaine and broke into the building to get money to buy more drugs.[856] This confession was allowed into evidence, and the ruling was affirmed by the court of appeals.[857] The evidence of the "other crime" of smoking cocaine was part of the interrelated events connected to the burglary and also was relevant to prove Sykes's motive.[858] Failure to give a limiting instruction was harmless error.[859]

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[848] *Id.* ¶ 9, 746 So. 2d at 948.
[849] *Id.* ¶ 4, 746 So. 2d at 948.
[850] *Id.* ¶ 9, 746 So. 2d at 949.
[851] *Id.* ¶ 12, 746 So. 2d at 950.
[852] *Id.* ¶ 11, 746 So. 2d at 950.
[853] *Id.* ¶ 15, 746 So. 2d at 950.
[854] *Id.*
[855] 97-KA-01545-COA, 749 So. 2d 239 (Miss. Ct. App. 1999).
[856] *Sykes*, ¶ 2, 749 So. 2d at 241.
[857] *Id.* ¶¶ 19, 27, 749 So. 2d at 244, 245.
[858] *Id.* ¶¶ 22-23, 749 So. 2d at 244-45.
[859] *Id.* ¶ 27, 749 So. 2d at 245.

Rodgers v. State[860]

Rodgers, in a retrial of his murder charges, was convicted of manslaughter and aggravated assault.[861] The crimes apparently resulted from a longstanding feud between neighbors.[862] Rodgers shot and killed a man who was with his neighbor as well as wounding the neighbor.[863] The State was allowed to show that two and a half years before this shooting, Rodgers had fired his shotgun into the neighbor's occupied yard.[864] Rodgers objected that this evidence was irrelevant because it was too remote in time.[865] On appeal, Rodgers made a Rule 404 objection.[866] The court of appeals held that the incident, though remote in time, was relevant at the judge's discretion to the issue of motive.[867] Additionally, the error was not preserved due to a lack of the specific objection at trial.[868]

Kelly v. State[869]

Kelly was convicted of murdering his girlfriend.[870] The State was permitted to show that Kelly had broken into his girlfriend's apartment and kidnapped her some time before the murder.[871] Kelly then made threats against her concerning her filing charges against him for those crimes.[872] He argued these were "other bad acts" excluded by Rule 404.[873] The court of appeals held these acts to be properly admitted to show motive.[874]

After the murder, Kelly was shown to have stolen a

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[860] 1999-KA-00022-COA, 777 So. 2d 673 (Miss. Ct. App. 2000).
[861] *Rodgers*, ¶ 1, 777 So. 2d at 674.
[862] *Id.* ¶¶ 3-5, 777 So. 2d at 674-75.
[863] *Id.* ¶¶ 3-4, 777 So. 2d at 674-75.
[864] *Id.* ¶¶ 5-6, 777 So. 2d at 675.
[865] *Id.* ¶ 6, 777 So. 2d at 675.
[866] *Id.*
[867] *Id.* ¶ 6-7, 777 So. 2d at 675.
[868] *Id.* ¶ 8, 777 So. 2d at 675.
[869] 98-KA-00726-COA, 783 So. 2d 744 (Miss. Ct. App. 2000).
[870] *Kelly*, ¶¶ 6-9, 783 So. 2d at 749-50.
[871] *Id.* ¶ 10, 783 So. 2d at 750.
[872] *Id.* ¶ 11, 783 So. 2d at 750.
[873] *Id.*
[874] *Id.* ¶ 12, 783 So. 2d at 750.

car.[875] Blood on the seat of the car matched the victim's DNA.[876] This was approved as evidence of interrelated events forming closely related transactions.[877] The evidence was also proof of flight and therefore of Kelly's conscious guilt.[878]

Wilhite v. State[879]

The evidence of Wilhite's financial difficulties was held to be properly admitted over her argument that there was no evidence of her robbing the victim and, further, that she was not charged with murder.[880] Wilhite's motive of robbery could be proved even though the State could not show that Wilhite accomplished the act.[881] The court of appeals found error, though not reversible, in the trial court's failure to give the requested limiting instruction.[882] The "other crimes" evidence was so dissimilar to the charge of murder that there was no danger of confusion or of misleading the jury.[883]

2. Opportunity

There are no Mississippi cases which focus on proving opportunity to commit a crime by the showing of other crimes or bad acts. In the few cases from other jurisdictions, it seems that proving opportunity means proving the defendant had the opportunity to commit a crime because he was, or could have been, at a certain place. An example would be proving the defendant had escaped from jail in order to show that he could have been at the location where the charged crime took place.[884] Another example would be proving the defendant

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[875] *Id.* ¶¶ 17, 20, 783 So. 2d at 752.

[876] *Id.* ¶ 20, 783 So. 2d at 752.

[877] *Id.*

[878] *Id.*

[879] 1998-KA-01126-COA, 791 So. 2d 231 (Miss. Ct. App. 2001); *see supra* notes 613-21 and accompanying text for a recitation of the facts and discussion of another evidentiary issue of this case.

[880] *Wilhite*, ¶¶ 4-5, 791 So. 2d at 236.

[881] *Id.* ¶ 5, 791 So. 2d at 236.

[882] *Id.* ¶ 8, 791 So. 2d at 237.

[883] *Id.*

[884] *See, e.g.*, United States v. Stover, 565 F.2d 1010, 1013 (8th Cir. 1977).

had been in the place where property was kept in order to prove he had the opportunity to steal it,[885] or proving the defendant was in prison in order to show he was involved in prison gang activity or dealing drugs in the prison.

3. Intent

Drug Cases. The most regular, and most disturbing, use of "other crime" evidence to prove intent has been in drug cases charging intent to distribute. The Mississippi Supreme Court has ruled that past drug sales by the defendant are admissible on the issue of defendant's intent to distribute. The justification for this is that subjective intent is hard to prove. It is intellectually and logically impossible to distinguish this from the use of such evidence to prove the defendant acted in conformity with his past conduct—the use prohibited by Rule 404(b).[886]

In *Holland v. State*,[887] the supreme court recognized that introducing prior sales to show intent to sell is very close to proving actions in conformity, but rationalized that the limiting instruction balanced the matter.[888] The instruction to the jury is that they may not consider the evidence of other sales on the issue of whether the defendant possessed the drugs with the intent to distribute, but only on the question of whether he intended to sell the drugs in his possession. This must leave them with a loud, "Say what?" in their minds.

The supreme court has provided one protection to the defendant in these cases, holding that if the only evidence of intent is proof of other sales, it is insufficient. Intent to distribute cannot be proven solely with proof of other sales.

Other Cases. Evidence of what the defendant has said or attempted is relevant to rebut a claim of heat of passion. Proof of other attempts to kill the victim may be relevant to show

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[885] *See, e.g.,* United States v. DeJohn, 638 F.2d 1048, 1052 (7th Cir. 1981).

[886] *See generally* Michael B. Hewes, Comment, *Skirting the Mississippi Rules of Evidence 404 Character Prohibition: Allowing Prior Drug Sales To Come in Under the Guise of "Intent" in Prosecutions for Possession With Intent to Sell*, 69 MISS. L.J. 499 (1999) (critiquing this line of cases).

[887] 656 So. 2d 1192 (Miss. 1995); *see infra* notes 890-97 and accompanying text.

[888] *Holland*, 656 So. 2d at 1196-97.

both identity of the killer and to show intent. Furthermore, evidence of similar acts may be relevant to rebut a defense that the crime was an accident or mistake by showing it was intended, having been done or attempted in the past.

a. Intent to distribute drugs:

CASES:

Smith v. State[889]

Holland v. State[890]

Holland was convicted of possession of crack with the intent to distribute.[891] The trial court allowed into evidence the fact that Holland admitted he had sold cocaine in the past when he was out of work, to prove his intent.[892] The only other evidence concerning his intent was that he had a crack rock on him when arrested, had over $200, a pager, had been seen in an exchange with another person, and was in an area where drugs were traded.[893] The supreme court approved the admission of the past sales because of the difficulty of proving intent.[894] The court observed that such evidence received on intent seems very close to just proving propensity to sell—the prohibited inference under Rule 404(b).[895] This is balanced however by the limiting instruction.[896] The court analyzed the other evidence besides past sales as not probative of intent and reversed, holding that the past sales standing alone were insufficient to prove intent to distribute beyond a reasonable doubt.[897]

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[889] 656 So. 2d 95 (Miss. 1995); *see supra* notes 518-26 and accompanying text for a recitation of the facts and discussion of this case.

[890] 656 So.2d 1192 (Miss. 1995).

[891] *Holland*, 656 So. 2d at 1194.

[892] *Id.*

[893] *Id.* at 1195.

[894] *Id.* at 1196.

[895] *Id.* at 1196-97.

[896] *Id.* at 1197.

[897] *Id.* at 1198-99.

Ott v. State[898]

Ott was convicted of selling drugs as part of a common plan or scheme.[899] The State had set up two buys by confidential informants a few hours apart with the transactions being transmitted by wires attached to the informants.[900] The buys were both set up in the same way; the defendant was paged by the customer, he came to a McDonald's parking lot and made the sales in his car.[901] The buys were alleged as two counts of selling.[902] Defendant moved for severance of the two counts of selling.[903] On the motion for severance, the trial judge denied the severance, in part because the evidence of both the buys would be admissible under Rule 404(b) in separate trials of both counts.[904] This decision was affirmed by the supreme court.[905] The court noted that such evidence of other sales is admissible to prove intent to sell.[906]

Note: The better ground for admitting the evidence would be to prove the common plan or scheme alleged.

Bryant v. State[907]

In convicting Bryant of possession of cocaine with the intent to distribute, the trial court allowed the State to prove Bryant's prior conviction of possession with intent.[908] The judge gave an instruction limiting the jury's consideration of that evidence to the issue of the defendant's intent.[909] This was affirmed by the court of appeals under standing authority with little discussion.[910]

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[898] 97-KA-00718-SCT, 722 So. 2d 576 (Miss. 1998).
[899] *Ott*, ¶ 1, 722 So. 2d at 577.
[900] *Id.* ¶ 2, 722 So. 2d at 577.
[901] *Id.* ¶¶ 3-4, 7, 8, 722 So. 2d at 578.
[902] *Id.* ¶ 18, 722 So. 2d at 580.
[903] *Id.* ¶ 15, 722 So. 2d at 579.
[904] *Id.* ¶¶ 20-21, 24, 722 So. 2d at 580-81.
[905] *Id.* ¶ 21, 722 So. 2d at 580-81.
[906] *Id.* ¶ 24, 722 So. 2d at 581.
[907] 95-KP-00816-COA, 746 So. 2d 853 (Miss. Ct. App. 1998).
[908] *Bryant*, ¶ 34, 746 So. 2d at 862.
[909] *Id.* ¶ 36, 746 So. 2d at 862.
[910] *Id.*

Swington v. State[911]

Swington was convicted of possession of cocaine with intent to distribute.[912] Undercover agents caught him when they bought from an addict, Reed, who was selling for Swington.[913] Swington claimed the drugs found near him when he was arrested were not his.[914] The State proffered that Reed would testify that he made another sale for Swington a short time before the sale to the agents.[915] It was also proffered that the defendant had been convicted of possession with intent some six years before.[916] The trial judge performed a Rule 403 balancing on both those offers and concluded that they were more probative to prove intent, motive, plan and knowledge than they were prejudicial.[917] The evidence was admitted and a limiting instruction was given as to both.[918] Swington did not object to the evidence on Rule 404 grounds.[919] The supreme court observed that error was not preserved, but the court considered the merits anyway since the defendant also claimed ineffective assistance of counsel.[920] The court eventually affirmed.[921] The evidence was probative of those mental states mentioned, and the trial judge carefully considered the Rule 403 issue and gave limiting instructions.[922]

Mitchell v. State[923]

Mitchell was convicted of possession of cocaine with the intent to distribute.[924] The evidence showed that Mitchell was caught with 7.1 grams of the drug.[925] The trial court conclud-

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[911] 97-KA-00591-SCT, 742 So. 2d 1106 (Miss. 1999).
[912] *Swington*, ¶ 1, 742 So. 2d at 1109.
[913] *Id.* ¶ 2, 742 So. 2d at 1109.
[914] *Id.* ¶ 3, 742 So. 2d at 1109.
[915] *Id.* ¶ 8, 742 So. 2d at 1109.
[916] *Id.* ¶ 14, 742 So. 2d at 1112.
[917] *Id.* ¶ 11, 742 So. 2d at 1111.
[918] *Id.* ¶ 13, 742 So. 2d at 1111.
[919] *Id.* ¶ 9, 742 So. 2d at 1110.
[920] *Id.*
[921] *Id.* ¶ 13, 742 So. 2d at 1111.
[922] *Id.*
[923] 98-KA-00199-COA, 754 So. 2d 519 (Miss. Ct. App. 1999).
[924] *Mitchell*, ¶ 1, 754 So. 2d at 520.
[925] *Id.* ¶ 3, 754 So. 2d at 520.

ed that this amount was consistent with personal use and inconsistent with the intent to sell.[926] The State was allowed to show two prior convictions of selling drugs, the most recent of which was almost ten years prior to the alleged crime.[927] The trial judge did a Rule 403 balancing, allowed the evidence on the issue of intent, and administered a limiting instruction.[928] The court of appeals expressed concern about whether there was any time limit on prior sales admitted to prove intent, but declined to set any such limit.[929] The court did find, however, that the only evidence of intent was the prior sales and, consistent with standing authority, insufficient as a matter of law to prove intent.[930] Thus, the trial court was reversed.[931]

Scruggs v. State[932]

Sumrall v. State[933]

Sumrall was convicted of two counts of possession with the intent to distribute.[934] The State was allowed to show that on the day before Sumrall was arrested and his drugs seized, he had sold crack to a confidential informant who had paid Sumrall with marked bills.[935] When Sumrall was arrested, he had two of those bills on him.[936] The State was also allowed to show Sumrall's prior conviction of a drug crime involving distribution.[937] The trial judge did a Rule 403 balancing and gave a limiting instruction.[938] This decision was affirmed by the court of appeals on the reasoning that prior crimes and

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[926] *Id.* ¶ 11, 754 So. 2d at 522.
[927] *Id.* ¶ 16, 754 So. 2d at 523.
[928] *Id.*
[929] *Id.* ¶ 16, 754 So. 2d at 523-24.
[930] *Id.* ¶ 18, 754 So. 2d at 524.
[931] *Id.* ¶ 22, 754 So. 2d at 525.
[932] 1998-KA-01344-COA, 756 So. 2d 817 (Miss. Ct. App. 2000); *see supra* notes 595-602 and accompanying text for a recitation of the facts and discussion of this case.
[933] 1998-KA-01144-COA, 758 So. 2d 1091 (Miss. Ct. App. 2000).
[934] *Sumrall*, ¶ 1, 758 So. 2d at 1092.
[935] *Id.* ¶¶ 2, 7, 758 So. 2d at 1093, 1094.
[936] *Id.* ¶ 4, 758 So. 2d at 1093.
[937] *Id.* ¶ 10, 758 So. 2d at 1094.
[938] *Id.* § 12, 758 So. 2d at 1095.

convictions are relevant on the issue of the defendant's intent to distribute drugs in his possession.[939]

b. Intent in non-drug cases.

CASES:

Jenkins v. State[940]

May v. State[941]

May was convicted of murdering her husband by shooting him in the neck with a shotgun.[942] Several witnesses were allowed to testify to threats May had made to kill her husband, ranging from ten months to a week before the killing.[943] May also blabbed to some witnesses that she had tried to poison her husband with rat poison.[944] The supreme court affirmed the trial court's decision to allow the testimony.[945] The threats were relevant to May's intent and the more remote threats were made relevant by the continuing links to the recent ones.[946]

Lewis v. State[947]

Defendants were convicted of felony shoplifting.[948] With others, they went to a Wal-mart and put an expensive VCR into the box of an inexpensive fan, resealed the box, checked out and started to leave.[949] A security guard observed and accosted them in the parking lot.[950] The defendants fled, leaving

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[939] *Id.* ¶¶ 13-14, 758 So. 2d at 1095.

[940] 507 So. 2d 89 (Miss. 1987); *see supra* notes 506-12 and accompanying text for a recitation of the facts and discussion of this case.

[941] 524 So. 2d 957 (Miss. 1988).

[942] *May*, 524 So. 2d at 959.

[943] *Id.* at 960-61.

[944] *Id.* at 960. May's husband's body was later found to have elevated levels of arsenic. *Id.*

[945] *Id.* at 962.

[946] *Id.*

[947] 573 So. 2d 719 (Miss. 1990).

[948] *Lewis*, 573 So. 2d at 720.

[949] *Id.* at 721.

[950] *Id.*

the loot in their shopping cart.[951] The police, alerted by the guard, followed them and found one of their cars stuck in a ditch and another car nearby.[952] In the second car and its vicinity, the police found other items of new merchandise.[953] At trial, the judge allowed testimony about the stash of other merchandise although there was no evidence linking it to the defendants or other shopliftings.[954] This decision was affirmed.[955] The supreme court recited the complete list of "other purposes" under Rule 404(b) but did not pick out any on which the evidence was relevant.[956] The evidence's greatest relevance appears to be showing the intent, and possibly the plan, of the defendants when they concealed the VCR at Walmart and took it outside to their car.[957]

Knowles v. State[958]

Knowles was convicted of failure to provide child support for his two daughters, a felony, under a statute which was amended during the period of his nonsupport.[959] The amendment materially changed the elements of the crime and increased the punishment.[960] The supreme court found this to be an *ex post facto* application of the new law as applied to the period before the amendment, and reversed.[961] In an unusual part of the opinion, the court provided "guidance" to the lower court on retrial.[962] In part, the supreme court advised that the evidence of Knowles's conduct (nonsupport) before the amendment of the act would be admissible under Rules 401, 402 and 404(b) on the fact issue of his willfulness in failing to support

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[951] *Id.*
[952] *Id.*
[953] *Id.*
[954] *Id.*
[955] *Id.*
[956] *Id.*
[957] *Id.* at 722.
[958] 96-KA-00681-SCT, 708 So. 2d 549 (Miss. 1998).
[959] *Knowles*, ¶¶ 1-2, 708 So. 2d at 551.
[960] *Id.* ¶ 5, 708 So. 2d at 552.
[961] *Id.* ¶ 33, 708 So. 2d at 559.
[962] *Id.* ¶¶ 25-27, 708 So. 2d at 556-57.

the girls.[963]

Edwards v. State[964]

Edwards argued the exclusion of his former girlfriend's prior bad habits was error, contending her conduct was admissible under Rule 404(b) to prove his intent.[965] Edwards's argument was rejected because Rule 404(b) allows evidence of bad conduct to show the intent of the actor, not of some other person.[966]

Moss v. State[967]

Moss was convicted of murder after shooting his wife for the reason that she had recently left him.[968] Moss's defense was that the murder occurred in the heat of passion.[969] The trial judge allowed into evidence that Moss had threatened to kill his wife in front of her father, and also two instances in which Moss abused her.[970] This evidence was held properly admitted in order to prove Moss's intent and motive.[971] This evidence contradicted his claim that the shooting was spontaneous and in the heat of passion.[972] The failure to give a cautionary instruction, even without a request, was harmless error.[973]

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[963] *Id.* ¶¶ 26-27, 708 So. 2d at 557.

[964] 97-KA-01562-COA, 726 So. 2d 274 (Miss. Ct. App. 1998); *see supra* notes 811-20 and accompanying text for a recitation of the facts and discussion of another evidentiary issue of this case.

[965] *Id.* ¶ 19, 726 So. 2d at 278.

[966] *Id.*

[967] 97-KA-0031-COA, 727 So. 2d 720 (Miss. Ct. App. 1998).

[968] *Moss*, ¶¶ 2-4, 727 So. 2d at 722.

[969] *Id.* ¶ 21, 727 So. 2d at 725.

[970] *Id.* ¶ 15, 727 So. 2d at 724.

[971] *Id.* ¶¶ 18-19, 727 So. 2d at 725.

[972] *Id.* ¶ 22, 727 So. 2d at 725.

[973] *Id.* ¶ 25, 727 So. 2d at 725-26.

Alford v. State[974]

The defendant was convicted of murdering her husband.[975] A man actually shot him, but she had helped.[976] One of the Alford's employees testified to several conversations in which the defendant, Mrs. Alford, had indicated she wanted to kill her husband and described some of the efforts she had made to carry out the murder.[977] The court held that the evidence was admissible to prove the issue of intent.[978] The same employee was allowed to testify that Alford said that she had sex with a man in order to prevent him from killing the employee.[979] The court held that this testimony was admissible as an attempt to cover-up the crime and perhaps an attempt to keep the employee from testifying.[980]

Davis v. State[981]

Davis was convicted of capital murder, which was committed in an armed robbery.[982] Davis obtained the gun from a witness who was keeping it for one of his companions.[983] The judge overruled the motion *in limine* to keep that witness from testifying that when Davis went to get the gun, he threatened to "shoot up" the witness's apartment if he did not give it to him.[984] The defense claimed this was excluded under the character evidence rule.[985] The trial judge ruled it was admissible because the testimony's probative value outweighed any prejudice.[986] This was affirmed.[987] The evidence was relevant to the defendant's motive, intent, and his state of

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[974] 1998-KA-10418-COA, 760 So. 2d 48 (Miss. Ct. App. 2000).
[975] *Alford*, ¶ 6, 760 So. 2d at 51.
[976] *Id.* ¶ 5, 760 So. 2d at 51.
[977] *Id.* ¶¶ 7-8, 760 So. 2d at 51.
[978] *Id.* ¶ 13, 760 So. 2d at 53.
[979] *Id.* ¶ 15, 760 So. 2d at 53.
[980] *Id.*
[981] 98-KA-00130-SCT, 767 So. 2d 986 (Miss. 2001).
[982] *Davis*, ¶¶ 1-2, 767 So. 2d at 989.
[983] *Id.* ¶ 2, 767 So. 2d at 989.
[984] *Id.* ¶ 28, 767 So. 2d at 996.
[985] *Id.* ¶¶ 28-29, 767 So. 2d at 996-97.
[986] *Id.* ¶ 29, 767 So. 2d at 997.
[987] *Id.* ¶ 30, 767 So. 2d at 997.

mind just before the robbery.[988] The trial judge correctly applied the Rule 403 balancing test in making the ruling.[989]

B.R.C. ex rel. *S.C. v. State*[990]

In this case, the father appealed from a youth court decision finding that he had abused his three-year-old daughter and neglected his ten-year-old son.[991] The judge allowed testimony from an older half-sister about the father getting into bed with her and touching her inappropriately, and testimony from the son about the father using a *Playboy* magazine to teach him about sex.[992] The youth court's decision to allow the testimony was affirmed because the acts were offered to prove things other than the father's propensity to commit such acts.[993] The girl's testimony was relevant to show intent, knowledge, and absence of mistake, and substantiated that the girl was not mistaking good touches for bad touches.[994] The boy's testimony was relevant to prove motive, intent, and absence of mistake.[995]

4. Preparation

There is only one case which isolates preparation as the specific issue in which other crimes are relevant. This is likely because preparation to commit a crime is included in the "plan" or "scheme" category and is often part of the "interrelated events" category, one of the important "unlisted other purposes." Other crimes in preparation for the charged crime might include stealing a gun or a car in preparation for a robbery. In addition, rehearsing by committing a less significant crime might properly be considered as preparation for the major crime charged. However, there are few cases involving this issue reported from other jurisdictions.

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[988] *Id.*
[989] *Id.*
[990] 2000-CA-00837-SCT, 795 So. 2d 526 (Miss. 2001).
[991] *B.R.C. ex rel. S.C.*, ¶ 1, 795 So. 2d at 527-28.
[992] *Id.* ¶ 16, 795 So. 2d at 530.
[993] *Id.* ¶¶ 17-20, 795 So. 2d at 530-31.
[994] *Id.* ¶ 17, 795 So. 2d at 530-31.
[995] *Id.* ¶ 18, 795 So. 2d at 531.

CASES:

Lindsey v. State[996]

The defendant was convicted of murder.[997] The trial judge allowed into evidence several pieces of other crimes.[998] Lindsey's uncle and the co-defendant, who turned state's evidence, both testified about Lindsey stealing a gun from his uncle.[999] The co-defendant also testified that he and the defendant stole the car they drove to the scene of the murder.[1000] The trial judge ruled that this was admissible to prove preparation to commit the crime.[1001] Although urged by the district attorney to make a separate rule 403 ruling, the judge indicated he had considered probative value versus unfair prejudice in deciding the admissibility under rule 404(b).[1002] This was affirmed.[1003] The court of appeals found that the trial judge properly balanced the probative value versus the unfair prejudice in a one-step process instead of using two steps.[1004] The court of appeals held that the evidence was probative of preparation.[1005] The trial court also gave both attorneys the option to request a limiting instruction.[1006] The defense attorney replied that he was not requesting one.[1007] Although no instruction was given, the court held that there was adequate compliance with the *Smith* requirement for the instruction.[1008] Therefore, error, if any, was held to have been harmless.[1009]

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[996] 98-KA-00217-COA, 754 So. 2d 506 (Miss. Ct. App. 1999).
[997] *Lindsey*, ¶ 1, 754 So. 2d at 507.
[998] *Id.* ¶ 21, 754 So. 2d at 510.
[999] *Id.* ¶ 28, 754 So. 2d at 511.
[1000] *Id.* ¶ 35, 754 So. 2d at 512.
[1001] *Id.* ¶ 36, 754 So. 2d at 512-13.
[1002] *Id.*
[1003] *Id.* ¶ 45, 754 So. 2d at 515.
[1004] *Id.* ¶ 37, 754 So. 2d at 513-14.
[1005] *Id.* ¶ 40, 754 So. 2d at 514-15.
[1006] *Id.* ¶¶ 41-42, 754 So. 2d at 514-15.
[1007] *Id.* ¶ 42, 754 So. 2d at 515.
[1008] *Id.* ¶ 45, 754 So. 2d at 515.
[1009] *Id.*

Leedom v. State[1010]

Leedom was convicted of both conspiracy to commit murder and capital murder.[1011] Leedom fraudulently obtained substantial policies of life insurance on the victim, with herself as beneficiary.[1012] She then hired the killer who murdered the victim.[1013] The killer turned state's evidence and testified to his part in the scheme.[1014] The trial judge also allowed evidence that after that murder the defendant had obtained life insurance policies on another man and hired the killer to murder him also.[1015] This ruling was affirmed.[1016] The evidence was probative to prove preparation and plan.[1017] The fact that the admitted evidence concerned events which occurred after the first murder did not diminish its value to prove the conspirators were proceeding according to an agreed plan and had similar preparations for the murders.[1018]

5. Plan/Scheme

Cases involving this issue typically show the defendant has used the same plan for committing the charged crime that was used to commit the other previous crimes. Having a plan is not a crime, except in conspiracy cases, and it is often difficult to discern just what relevancy the plan has to any disputed issue relating to the charged crime. It seems that if evidence of a plan slips in, the court avoids reversal by saying it was relevant to prove the plan. The fact that the defendant had a plan should only be relevant if there is a dispute about identity, intent, knowledge or some other essential part of the State's case. For instance, if the defendant in a bad-check false pretenses case claims he didn't know there was no money in the account, showing he cashed other bad checks on the account as

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[1010] 1999-KA-01754-SCT, 796 So. 2d 1001 (Miss. 2001).
[1011] *Leedom*, ¶ 2, 796 So. 2d at 1012.
[1012] *Id.* ¶¶ 6-11, 796 So. 2d at 1013-14.
[1013] *Id.* ¶ 12, 796 So. 2d at 1014.
[1014] *Id.*
[1015] *Id.* ¶ 14, 796 So. 2d at 1014.
[1016] *Id.* ¶ 19, 796 So. 2d at 1016.
[1017] *Id.* ¶ 18, 796 So. 2d at 1016. The court did not mention conspiracy.
[1018] *Id.* ¶ 19, 796 So. 2d at 1016.

part of a plan would rebut his claim of no knowledge and no intent.

CASES:

Fisher v. State[1019]

Fisher was convicted of rape.[1020] He drove up behind the victim who was alone in her car at night, flashed his headlights until she stopped, then got her out of her car by telling her the license plate was loose.[1021] He forced her into his truck, drove her off someplace, raped her and brought her back to her car.[1022] In the same county, another woman had disappeared while driving alone; another had been murdered.[1023] Fisher was caught when the police used a policewoman as a decoy who drove the roads at night.[1024] Once again, Fisher used his flashing lights ploy to get her to stop, but when he came up to her car he was surprised by another officer who was down in the back seat.[1025] The State was allowed to prove by another woman that she too had stopped because of flashing lights behind her and that the man had come up to tell her the tag was loose when it wasn't.[1026] No explanation was mentioned about why she wasn't raped.[1027] The court affirmed the trial judge's ruling, noting that showing *modus operandi* usually is offered to prove identification.[1028] However, here it was relevant to prove his plan of approaching his victims.[1029]

[1019] 532 So. 2d 992 (Miss. 1988).
[1020] *Fisher*, 532 So. 2d at 994.
[1021] *Id.*
[1022] *Id.*
[1023] *Id.*
[1024] *Id.*
[1025] *Id.*
[1026] *Id.* at 999-1000.
[1027] *Id.*
[1028] *Id.*
[1029] *Id.*

Smith v. State[1030]

Smith was convicted of conspiracy to possess marijuana with intent to distribute.[1031] Smith's part of the import scheme was to meet a female drug courier who flew in from Texas with the drugs, take the courier to her home, make a phone call to El Paso, and then make the delivery somewhere in Jackson.[1032] During the trial, the courier testified that they had used this plan five times before.[1033] On appeal Smith claimed this was improper use of character evidence in violation of Rule 404.[1034] The Supreme Court held that the evidence of prior crimes was admissible to show the plan or scheme, and that they intended to sell the drugs.[1035] Thus, the evidence was admissible for these "other purposes" under Rule 404(b).[1036]

Lee v. State[1037]

Lee was convicted of conspiracy to sell LSD.[1038] The State was allowed to use as evidence six sales to another man who resold the LSD in New Orleans.[1039] This was affirmed as relevant to show Lee's knowledge, ongoing plan and motive.[1040]

Haley v. State[1041]

Haley and three others beat and robbed a truck driver with a pistol as they were traveling from Hattiesburg to the coast.[1042] Haley was convicted and the other three pled.[1043]

[1030] 95-KA-01225-SCT, 716 So. 2d 1076 (Miss. 1998).
[1031] *Smith*, ¶¶ 10-11, 716 So. 2d at 1078.
[1032] *Id.* ¶¶ 2-4, 716 So. 2d at 1077.
[1033] *Id.* ¶ 6, 716 So. 2d at 1078.
[1034] *Id.* ¶ 15, 716 So. 2d at 1079.
[1035] *Id.* ¶¶ 20, 22, 716 So. 2d at 1079-80.
[1036] *Id.* ¶ 22, 716 So. 2d at 1080.
[1037] 97-KA-01513-COA, 733 So. 2d 336 (Miss. Ct. App. 1999).
[1038] *Lee*, ¶ 1, 733 So. 2d at 340.
[1039] *Id.* ¶ 10, 733 So. 2d at 342.
[1040] *Id.* ¶ 15, 733 So. 2d at 343.
[1041] 97-KA-00616-COA, 737 So. 2d 371 (Miss. Ct. App. 1998).
[1042] *Haley*, ¶¶ 2-4, 737 So. 2d at 373.
[1043] *Id.* ¶ 5, 737 So. 2d at 373 n.1.

One of the others, a female, testified that the group made the plan that she would get the victim to open the door of his vehicle and the others would rob him.[1044] She stated that they had first planned to rob a drug dealer.[1045] Haley objected and moved for a mistrial; both motions were overruled.[1046] On appeal, Haley argued this was inadmissible character evidence.[1047] The court of appeals rejected his argument and noted that Rule 404(b) permits evidence of other bad acts to prove matters in issue such as plan, intent, motive and crimes interrelated with the one charged.[1048] The evidence was relevant to show their intent and plan.[1049] No mention was made of a limiting instruction.

Humphrey v. State[1050]

Humphrey was convicted of capital murder in the asphyxiation death of the elderly victim whose house he was burglarizing.[1051] Humphrey bound and taped her mouth, which eventually led to her death.[1052] Humphrey moved to exclude testimony of a State's witness that he had a gun in his possession two days before the burglary and said he would use it if anything went wrong.[1053] The trial judge overruled the motion, holding the evidence was relevant to Humphrey's plan.[1054] This was affirmed.[1055] The supreme court ruled that the evidence was relevant to show plan, preparation and intent.[1056] The court held that the two day time difference did not make the evidence so remote as to constitute an abuse of discretion.[1057]

[1044] *Id.* ¶ 17, 737 So. 2d at 376.
[1045] *Id.*
[1046] *Id.* ¶ 18, 737 So. 2d at 377.
[1047] *Id.* ¶ 19, 737 So. 2d at 377.
[1048] *Id.* ¶ 20, 737 So. 2d at 377.
[1049] *Id.*
[1050] 98-KA-00372-SCT, 759 So. 2d 368 (Miss. 2000).
[1051] *Humphrey*, ¶¶ 1-6, 759 So. 2d at 372-73.
[1052] *Id.* ¶ 5, 759 So. 2d at 372-73.
[1053] *Id.* ¶ 30, 759 So. 2d at 379.
[1054] *Id.*
[1055] *Id.* ¶ 31, 759 So. 2d at 379-80.
[1056] *Id.*
[1057] *Id.*

Leedom v. State[1058]

6. Knowledge

Defendants sometimes claim they did not know something which they must have known if they had, in actuality, committed the crime. If they create such a dispute, then evidence that they committed other crimes which would give them the knowledge they disclaimed becomes relevant. In *Swington v. State*,[1059] the defendant was charged with dealing drugs.[1060] The agents found drugs under a paper on the table where Swington was sitting.[1061] The defendant claimed he didn't know they were there and that someone else put them there.[1062] Evidence of his other drug dealings, recent and remote, was admissible to show he did know and had the intent to sell.[1063]

Parker v. State[1064]

Parker was convicted of murdering a woman whose body was found along the railroad tracks.[1065] The State was permitted to prove that the next morning, Parker got a ride to the tracks, telling his driver that he wanted to pick up a package of marijuana he had left there.[1066] The State argued that the evidence was relevant to show Parker's knowledge of the crime, that he returned to the scene to see if the body had been discovered.[1067] However, the witness who drove Parker that morning testified that it was already common knowledge that the body had been found and that he was the one who insisted

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[1058] 1999-KA-01754-SCT, 796 So. 2d 1001 (Miss. 2001); *see supra* notes 1010-18 and accompanying text for a recitation of the facts and discussion of this case.

[1059] 97-KA-00591-SCT, 742 So. 2d 1106 (Miss. 1999); *see supra* notes 911-22 and accompanying text.

[1060] *Swington*, ¶ 7, 742 So. 2d at 1109-10.

[1061] *Id.* ¶¶ 4-5, 742 So. 2d at 1109.

[1062] *Id.*

[1063] *Id.* ¶ 13, 742 So. 2d at 1111.

[1064] 606 So. 2d 1132 (Miss. 1992).

[1065] *Parker*, 606 So. 2d at 1133, 1136.

[1066] *Id.* at 1137.

[1067] *Id.*

they get out of there when they saw the police cars.[1068] The supreme court rejected the State's argument, holding it was error to allow evidence of the unrelated drug crime by Parker.[1069] However, the error was harmless because the crimes were so dissimilar that any prejudice would be minimal.[1070]

Swington v. State[1071]

Harrison v. State[1072]

When police stopped Harrison for speeding and got his permission to search his rented car, they smelled the strong odor of marijuana.[1073] The search yielded 117 pounds of marijuana in a bag in the trunk.[1074] At Harrison's trial, in which he was convicted of possession with intent, he claimed that he had nothing to do with the marijuana, that he did not know it was there and that someone else must have put it there.[1075] The trial judge, after careful deliberation, including a probative-prejudice balancing, ruled that his Alabama misdemeanor conviction for possession of marijuana was admissible on the issue of his knowledge of marijuana in the car.[1076] The prior conviction was proof that Harrison had knowledge marijuana was in the car because he would have been acquainted with its smell.[1077] The trial judge's ruling was affirmed because the prior conviction was relevant to prove a disputed issue.[1078] Presumably, the judge gave a limiting instruction since it was not mentioned.

[1068] *Id.*

[1069] *Id.*

[1070] *Id.*

[1071] 97-KA-00591-SCT, 742 So. 2d 1106 (Miss. 1999); *see supra* notes 911-22 and accompanying text for a recitation of the facts and discussion of this case.

[1072] 1998-KA-01278-COA 2000 Miss. App. LEXIS 44 (Miss. Ct. App. 2000).

[1073] *Harrison*, ¶¶ 2-5, 2000 Miss. App. LEXIS, at *3.

[1074] *Id.* ¶ 5, 2000 Miss. App. LEXIS, at *3.

[1075] *Id.* ¶ 27, 2000 Miss. App. LEXIS, at *16.

[1076] *Id.* ¶ 32, 2000 Miss. App. LEXIS, at *19.

[1077] *Id.*

[1078] *Id.*

7. Identity

In cases where the defendant claims he was not the person who committed the crime, the State must produce a witness to identify him, evidence placing the defendant at the scene, evidence connecting the defendant with weapons used in the charged crime, or evidence identifying the defendant with a crime closely related to the charged crime, in order to create an inference that the defendant committed the charged crime. Occasionally, an accused has committed the other crimes using the same distinctive *modus operendi*, which identifies him as the person who committed this crime.

CASES:

Willie v. State[1079]

Underwood v. State[1080]

Underwood was convicted of capital murder committed during the kidnapping of the victim.[1081] The victim was found shot to death more than a day after her disappearance from her home.[1082] Underwood was connected to the killing by his possession of the gun which fired the fatal shots.[1083] The State was permitted to prove that he obtained the gun by burglary of his uncle's house, and that his uncle, after learning of the burglary, retrieved the gun from Underwood.[1084] The defense argued that the evidence was proof of other crimes, irrelevant to this charge.[1085] The supreme court held that the evidence was properly admitted to identify the defendant and to show the interrelated events that lead to the crime.[1086]

[1079] 585 So. 2d 660 (Miss. 1991); *see supra* notes 667-71 and accompanying text for a recitation of the facts and discussion of this case.

[1080] 95-DP-00866-SCT, 708 So. 2d 18 (Miss. 1998).

[1081] *Underwood*, ¶¶ 2-16, 708 So. 2d at 22-25.

[1082] *Id.* ¶ 8, 708 So. 2d at 23.

[1083] *Id.* ¶¶ 11-12, 708 So. 2d at 24.

[1084] *Id.* ¶¶ 40-43, 708 So. 2d at 31-32.

[1085] *Id.*

[1086] *Id.*

Warren v. State[1087]

Warren was convicted of voyeurism.[1088] He claimed it was error to allow the victim to testify about an incident which occurred more than a week after the incident for which he was charged.[1089] The victim testified that Warren came to her house, looked through the window, and threatened her more than a week after the first incident.[1090] Because she was the only witness who could identify the defendant, the trial judge allowed evidence of the second event as it related to the issue of identification.[1091] This was affirmed as an appropriate admission of other misconduct.[1092]

Smith v. State[1093]

Manning v. State[1094]

Manning appealed his death sentence as the result of convictions of two murders committed during a robbery.[1095] The defense argued that it was error to allow Manning's girlfriend to testify that three days after the murder he brought loads of goods to the house.[1096] The supreme court noted that the defense was procedurally barred from his complaint because there was no objection, but held the evidence admissible to show motive and identity.[1097]

[1087] 92-KA-01312-SCT, 709 So. 2d 415 (Miss. 1998).

[1088] *Warren*, ¶¶ 2, 9, 709 So. 2d at 417-18.

[1089] *Id.* ¶ 16, 709 So. 2d at 419.

[1090] *Id.*

[1091] *Id.* ¶¶ 16-20, 709 So. 2d at 419.

[1092] *Id.* ¶ 20, 709 So. 2d at 419.

[1093] 93-DP-00821-SCT, 724 So. 2d 280 (Miss. 1998); *see supra* notes 381-86 and accompanying text for a recitation of the facts and discussion of this case.

[1094] 95-DP-00066-SCT, 726 So. 2d 1152 (Miss. 1998).

[1095] *Manning*, ¶ 1, 726 So. 2d at 1162.

[1096] *Id.* ¶ 46, 726 So. 2d at 1171.

[1097] *Id.* ¶¶ 47-50, 726 So. 2d at 1171-72.

Smith v. State[1098]

The Smith brothers were convicted of murder and sentenced to death.[1099] A woman testified that they picked her up that night displaying a pistol, and assaulted her with a knife.[1100] The defense did not object to the testimony about the knife and gun.[1101] On appeal, the defense raised the issue generally, which the trial court took as a relevancy claim.[1102] The supreme court held that the evidence concerning the knife and gun was relevant to show that the brothers were armed that night; in particular, that they had a pistol, because the victim was shot with a similar pistol.[1103] On the issue of the other crime of assaulting the witness, the court held that the evidence was relevant to show how the woman was able to identify the knife and gun and that the defendants possessed them.[1104] Therefore, the evidence was admissible for the other purposes of showing preparation, plan, knowledge and identity.[1105]

Bennett v. State[1106]

Bennett was convicted of murdering a woman who tried to buy crack from him.[1107] An altercation arose between them; she rammed his car and he later shot her.[1108] The state's witness testified that the woman first asked her about getting the crack and the witness then flagged down Bennett as a "D-boy."[1109] The witness was allowed to explain that she knew Bennett would sell crack.[1110] On appeal, the use of the testimony was affirmed as prior bad conduct, which was admissi-

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[1098] 93-DP-01470-SCT, 729 So. 2d 1191 (Miss. 1998).
[1099] *Smith*, ¶ 1, 729 So. 2d at 1195.
[1100] *Id.* ¶ 65, 729 So. 2d at 1206.
[1101] *Id.* ¶ 63, 729 So. 2d at 1205-06.
[1102] *Id.* ¶ 64, 729 So. 2d at 1206.
[1103] *Id.*
[1104] *Id.* ¶¶ 65-68, 729 So. 2d at 1206.
[1105] *Id.*
[1106] 97-KA-01541-COA, 738 So. 2d 300 (Miss. Ct. App. 1999).
[1107] *Bennett*, ¶¶ 1-3, 738 So. 2d at 302.
[1108] *Id.* ¶ 3, 738 So. 2d at 302.
[1109] *Id.* ¶ 12, 738 So. 2d at 304. A "D-boy" is a person who sells marijuana. *Id.*
[1110] *Id.* ¶ 14, 738 So. 2d at 304.

ble as evidence identifying the defendant, and also as being intertwined with the instant crime.[1111] The victim was directed to Bennett because it was known that he would provide the drugs.[1112]

Brooks v. State[1113]

Brooks appealed his conviction of selling crack to an undercover agent.[1114] The buy was audio-taped, but at trial Brooks contended the voice on the tape was not his and that the State was prosecuting the wrong person.[1115] The trial judge allowed into evidence that an officer got a "jail photo" of the defendant and showed it to the undercover buyer who identified the person as the defendant.[1116] This was affirmed despite Brooks's claim that it introduced prior crimes in violation of Rule 404.[1117] The trial judge made a considered finding that the probative value to prove the identity of Brooks was greater than any prejudicial effect.[1118] The prejudice was considered small because the photo was not introduced and the jury was not told what Brooks was involved in when the photo was taken.[1119] The evidence was relevant to the disputed issue of identity and properly weighed before it was admitted.[1120]

Adams v. State[1121]

Adams was convicted of sexually assaulting a young woman in Oxford.[1122] When she returned home and entered her bedroom, Adams came out of a closet, assaulted and raped her.[1123] At trial, another young woman was allowed to testify

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[1111] *Id.* ¶ 15, 738 So. 2d at 304.
[1112] *Id.*
[1113] 2000-KA-00279-COA, 788 So. 2d 794 (Miss. Ct. App. 2001).
[1114] *Brooks*, ¶ 7, 788 So. 2d at 796.
[1115] *Id.* ¶ 11, 788 So. 2d at 797.
[1116] *Id.* ¶ 5, 788 So. 2d at 796.
[1117] *Id.* ¶ 16, 788 So. 2d at 798.
[1118] *Id.* ¶¶ 13-14, 788 So. 2d at 798.
[1119] *Id.* ¶ 17, 788 So. 2d at 798.
[1120] *Id.* ¶ 18, 788 So. 2d at 798-99.
[1121] 2000-KA-00242-COA, 794 So. 2d 1049 (Miss. Ct. App. 2001).
[1122] *Adams*, ¶ 1, 794 So. 2d at 1052.
[1123] *Id.* ¶ 4, 794 So. 2d at 1053-54.

that the night before the attack in dispute, the same thing happened to her in her apartment, which was located four doors down from the apartment of the rape victim.[1124] The witness entered her bedroom after being away when a man came at her from her closet and attempted to overcome her.[1125] She had escaped the rape by screaming.[1126] The rape victim could not identify Adams because her face had been covered by a towel, however, the witness was able to positively identify him.[1127] The trial judge conducted a hearing on defense's motion *in limine* and decided the evidence was more probative on his identity than it was prejudicial.[1128] This was affirmed.[1129] The court of appeals wrote that the evidence of the previous assault on the witness was relevant to prove opportunity, preparation, knowledge and identity.[1130] The court noted that the uniformity of the attacks and the closeness of the apartments made the incidents very similar.[1131] The evidence seems to have been primarily admitted to show the identity of Adams as the rapist.

8. No Mistake or Accident

Defendants sometimes claim that whatever happened to the victim was an accident or that the defendant made a mistake. This defense invites evidence that the defendant committed other crimes, usually of similar nature, to rebut the claim of defendant's innocent acts. This has occurred several times in child abuse cases where defendant says the injury to the child was from an accident. This allows proof that the defendant has previously abused the child. In those cases, there seems to be a tendency to believe that just proving that the child has been injured in the past is enough to justify allowing that evidence in against the defendant. It is not. The evidence must show

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[1124] *Id.* ¶¶ 11-13, 794 So. 2d at 1055.
[1125] *Id.*
[1126] *Id.*
[1127] *Id.*
[1128] *Id.* ¶ 14, 794 So. 2d at 1055.
[1129] *Id.* ¶ 15, 794 So. 2d at 1055-56.
[1130] *Id.*
[1131] *Id.*

that the defendant had previously abused the child. The *Lester v. State*[1132] case so holds. The opinion in *Bradford* v. *State*[1133] does not indicate that the evidence connected the defendant to the previous injuries to the baby. Since the record did not connect the defendant to the injury, the court of appeals ignored the supreme court's earlier ruling in *Lester*.

CASES:

Wheeler v. State[1134]

In this aggravated assault case, when four officers went to Wheeler's home to arrest him, he took the pistol from one of them, shot and killed one, and wounded another.[1135] The decision to allow the State to prove the shooting murder of the other officer in this trial was affirmed.[1136] The evidence was needed for the State to relate the "complete story of the crime."[1137] Wheeler's defense was that the shooting was an accident because he claimed he never had control of the gun.[1138] The evidence of the shooting of the officer was relevant to rebut his claim of accident.[1139]

Lewis v. State[1140]

The evidence concerning the merchandise found in the nearby car was also relevant to show absence of mistake or accident, because the defendants denied any connection to the other merchandise found near their car.[1141]

[1132] 692 So. 2d 755 (Miss. 1997); *see infra* note 81 and accompanying text.

[1133] 1998-KA-01699-COA, 759 So. 2d 434 (Miss. Ct. App. 2000); *see supra* notes 575-84 and accompanying text.

[1134] 536 So. 2d 1347 (Miss. 1988) (*Wheeler I*).

[1135] *Wheeler I*, 536 So. 2d at 1349. Affirmance of Wheeler's conviction in the murder of one of the officers precedes this opinion in the Southern Reporter. *See generally* Wheeler v. State (*Wheeler II*), 536 So. 2d 1341 (Miss. 1988).

[1136] *Wheeler I*, 536 So. 2d at 1352.

[1137] *Id.*

[1138] *Id.*

[1139] *Id.*

[1140] 573 So. 2d 719 (Miss. 1990); *see supra* notes 947-57 and accompanying text for a recitation of the facts and discussion of another evidentiary issue of this case.

[1141] *Id.*

Lester v. State[1142]

The injuries to the child, by implication but not by evidence, were attributed to the defendant who claimed the earlier injuries were accidental.[1143]

The supreme court reversed, holding that when bad acts are admissible they must be supported by evidence sufficient to support a finding, although not necessarily by a preponderance of the evidence, that the defendant did the acts, under Rule 104(b).[1144] Allowing evidence of the sexual abuse of the baby without proof that the defendant did it was reversible error.[1145]

Givens v. State[1146]

Givens was convicted of fondling his step-daughter in 1991 by placing his hand on her bottom.[1147] The girl did not tell her mother about the fondling incident until a similar event in 1996.[1148] Givens was charged with the 1991 event when the girl was about six years-old.[1149] Givens admitted to the touching, but claimed that it was a mistake and without lustful purpose.[1150] The judge allowed the State to prove that Givens had touched her in similar ways some eight times after the first episode.[1151] The purpose was to allow the State to explain the long period between the first event and the time she finally told her mother and also to rebut Givens' claim that his touching the girl was inadvertent and a mistake.[1152] This holding was affirmed by the court of appeals.[1153] The trial

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[1142] 692 So. 2d 755 (Miss. 1997); *see supra* notes 74-79, 232-35, 482-84, 803-05 and accompanying text for a recitation of the facts and discussion of other evidentiary issues of this case.

[1143] *Id.*

[1144] *Id.* at 779.

[1145] *Id.* at 783.

[1146] 96-KA-00650-COA, 730 So. 2d 81 (Miss. Ct. App. 1998).

[1147] *Givens*, ¶¶ 1, 5, 730 So. 2d at 83-84.

[1148] *Id.* ¶ 3, 730 So. 2d at 84.

[1149] *Id.* ¶ 5, 730 So. 2d at 84.

[1150] *Id.* ¶ 16, 730 So. 2d at 86.

[1151] *Id.* ¶ 24, 730 So. 2d at 88.

[1152] *Id.* ¶¶ 29, 43, 730 So. 2d at 89, 93.

[1153] *Id.* ¶ 47, 730 So. 2d at 94.

court conducted a thorough analysis of the relevancy of the evidence and correctly allowed it.[1154]

Bradford v. State[1155]

B.R.C. ex rel. S.C. v. State[1156]

C. Rule 404(b)-Unlisted Other Purposes:

In addition to the eight "other purposes" listed in Rule 404(b), our court has so far found ten other purposes upon which "other crimes" evidence may be relevant and admissible.

1. Interrelated Events/Explain Events/Complete Story

This is the most often stated reason for affirming rulings admitting "other crimes" evidence. There have been thirty-seven cases using this as justification for such evidence. It is a paraphrase of the pre-rule concept of allowing the *res gestae* to be proven, that is all the events, occurrences and activities closely connected to the crime being tried. This is allowed even if it means showing that the defendant committed other crimes. This allows proof of other assaults or homicides which occurred at the same time the one being tried was committed. It allows proof of a series of connected crimes which explain all the occurrences and events leading to the crime being tried. One case allowed the defendant's crimes including jail escape, burglary, grand larceny of the murder weapon, another burglary, and finally to the murder being charged.[1157] All were said to be needed to show the jury the complete story.[1158]

[1154] *Id.* However, the court noted that a limiting instruction concerning the purpose of admitting the evidence of other bad acts was necessary, but called it harmless error. *Id.*

[1155] 1998-KA-01699-COA, 759 So. 2d 434 (Miss. Ct. App. 2000); *see supra* notes 575-84 and accompanying text for a recitation of the facts and discussion of this case.

[1156] 2000-CA-00837-SCT, 795 So. 2d 526 (Miss. 2001); *see supra* notes 990-95 and accompanying text for a recitation of the facts and discussion of the case.

[1157] *See* Odom v. State, 1998-KA-01281-COA, 768 So. 2d 189 (Miss. 2000); *infra* notes 1331-45 and accompanying text.

[1158] *Odom*, ¶¶ 13-14, 769 So. 2d at 194-95.

The court of appeals has begun to create some limits on this very broad justification for allowing "other crimes" evidence. In *Ainsworth v. State*,[1159] the court of appeals reversed a conviction in which the State had been allowed to prove that the day after the alleged murder, the defendant tested positive for marijuana.[1160] The court wrote that other crimes as part of the interrelated events of the charged crime can be shown when they are so connected that the charged crime cannot be shown without presenting the related crime.[1161] The drug offense was not so connected and the alleged murder could be proven without showing the other bad act.[1162]

CASES:

Robinson v. State[1163]

Robinson, convicted of murder, claimed he was acting in self-defense when he shot the victim.[1164] The State was allowed to cross Robinson about taking a wallet from the pocket of the victim.[1165] This was affirmed by the supreme court.[1166] Although it suggested another crime, it was so closely related to the shooting as to be a single transaction.[1167]

Lockett v. State[1168]

[1159] 98-KA-00601-COA, 756 So. 2d 826 (Miss. Ct. App. 2000); *see supra* notes 169-79 and accompanying text.

[1160] *Ainsworth*, ¶ 13, 756 So. 2d at 829-30.

[1161] *Id.* ¶¶ 12-13, 756 So. 2d at 829.

[1162] *Id.* ¶ 13, 756 So. 2d at 829.

[1163] 497 So. 2d 440 (Miss. 1986).

[1164] *Robinson*, 497 So. 2d at 441.

[1165] *Id.* at 442.

[1166] *Id.*

[1167] *Id.* at 442-43.

[1168] 517 So. 2d 1317 (Miss. 1987) (*Lockett I*); 517 So. 2d 1346 (Miss. 1987) (*Lockett II*); *see supra* notes 756-60 and accompanying text for a recitation of the facts and discussion of these cases.

Shaw v. State[1169]

Shaw was convicted of murdering a man.[1170] The State was allowed to prove that he also killed his ex-wife at the same time.[1171] This was affirmed by the supreme court as an interrelated part of the same incident.[1172]

Hartfield v. State[1173]

In the trial of the defendant for uttering a forged check, the State was allowed to prove the events in which Hartfield had actually forged the check.[1174] This was affirmed by the supreme court as part of the related events of the charged crime.[1175]

Brown v. State[1176]

Brown, a justice court judge and disabled veteran, was convicted on a multi-count indictment of sexual battery of a minor child, touching a minor child, and two counts of contributing to the delinquency of minors.[1177] Brown had engaged in a several month-long odyssey of bizarre sex with two girls, aged thirteen and fourteen.[1178] He showed them pictures of nude women, had them pose nude, provided them alcohol and drugs, had them perform sexual acts on him and each other, and showed them movies of lesbians.[1179] All this evidence was shown at the trial.[1180] The evidence ruling initially came on Brown's motion to sever the various counts of the indictment.[1181] The defense argued that the multi-count indictment was only proper if the evidence of the crimes would be mutual-

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[1169] 521 So. 2d 1278 (Miss. 1987).
[1170] *Shaw*, 521 So. 2d at 1279.
[1171] *Id.* at 1281.
[1172] *Id.*
[1173] 532 So. 2d 1237 (Miss. 1988).
[1174] *Hartfield*, 532 So. 2d at 1238.
[1175] *Id.* at 1239.
[1176] 534 So. 2d 1019 (Miss. 1988).
[1177] *Brown*, 534 So. 2d at 1021.
[1178] *Id.*
[1179] *Id.*
[1180] *Id.* at 1023.
[1181] *Id.*

ly admissible in separate trials.[1182] Here, the court found that the crimes arose from a connected series of interrelated occurrences and the evidence of each was admissible for each of the charged crimes.[1183] Therefore, there was no error in permitting the multi-count trial.[1184]

Note: In *Corley v. State,*[1185] the supreme court, again dealing with the propriety of a multi-count indictment, in footnoted dictum wrote that it was irrelevant that evidence of the various crimes included in such an indictment was admissible under Rule 404(b).[1186]

Wheeler v. State[1187]

Bradley v. State[1188]

Bradley was convicted of selling cocaine based on a buy made by a confidential informant.[1189] The informant described the buy and then said she had a conversation with Bradley about buying some more at a later time; he indicated she could.[1190] This was affirmed by the supreme court, the conversation being part of the transaction involved in this charge.[1191]

Mackbee v. State[1192]

Mackbee was separately indicted for the murders of two boys.[1193] The bodies were discovered together in the trunk of a car Mackbee had stolen, and the investigations leading to his

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[1182] *Id.* at 1022.
[1183] *Id.* at 1023.
[1184] *Id.*
[1185] 584 So. 2d 769 (Miss. 1991).
[1186] *Corley*, 584 So. 2d at 722 n.1.
[1187] 536 So. 2d 1347, 1352 (Miss. 1988); *see supra* notes 1134-39 and accompanying text for a recitation of the facts and discussion of this case.
[1188] 562 So. 2d 1276 (Miss. 1990).
[1189] *Bradley*, 562 So. 2d at 1278.
[1190] *Id.* at 1282.
[1191] *Id.*
[1192] 575 So. 2d 16 (Miss. 1990).
[1193] *Mackbee*, 575 So. 2d at 19.

arrest were intertwined.[1194] Mackbee complained of allowing evidence of the other murder in the trial of this charge.[1195] This was affirmed by the supreme court, which recited the familiar litany that evidence of other crimes is admissible when it is so interrelated with the one at trial that they are part of the same transaction.[1196]

Baine v. State[1197]

Baine was separately charged with sexual molestation of three children who attended the day care facility he operated, arising from incidents over a period of months.[1198] The cases were all tried separately.[1199] In this trial, the prosecutor cautioned the seven-year-old victim that she should only tell about what happened to her, not what happened to other children.[1200] Apparently, the molestation had occurred when several children were present.[1201] The little girl, in responding to questions about what Baine did, used plural pronouns such as "we," "our" or "us," describing what Baine did to the children in the presence of each other.[1202] Baine argued this introduced other crimes.[1203] This argument was rejected by the supreme court because these events were interrelated in time, place and fact, and thus were rationally related to the crime charged; therefore there was no error.[1204]

[1194] *Id.*
[1195] *Id.* at 24.
[1196] *Id.* at 27-28.
[1197] 604 So. 2d 258 (Miss. 1992); *see infra* notes 1544-48 and accompanying text for a discussion of another evidentiary issue of this case.
[1198] *Baine*, 604 So. 2d at 259.
[1199] *Id.*
[1200] *Id.* at 261.
[1201] *Id.*
[1202] *Id.*
[1203] *Id.*
[1204] *Id.* at 261-62.

Hurns v. State[1205]

Hurns was convicted of non-capital murder for the jailhouse beating death of another inmate.[1206] The State was allowed to prove that Hurns was the leader of a gang, the "posse," which controlled and terrorized their part of the jail.[1207] The gang subjected other inmates to "blanket parties," where the victim was covered with a blanket and the "posse" kicked and hit the victim.[1208] Hurns had forced the victim and another inmate to have sex, then the group of them ganged up on the victim, beat and kicked him and he subsequently died.[1209] Hurns complained of the evidence showing his leadership of the "posse" and their other violent acts.[1210] This was affirmed as part of the related events which led to the killing.[1211] The evidence was also relevant to show Hurns's domination of the gang and his ability to make them do what he told them to do.[1212]

Duplantis v. State[1213]

Duplantis was convicted of capital murder and sentenced to death.[1214] While reversing on other grounds, the supreme court affirmed the trial court's rulings admitting evidence of other crimes committed by the defendant.[1215] Duplantis, with his co-defendant, escaped from jail, broke into a business where they stole food, boltcutters, and the murder weapon, and then broke into the house which had been occupied by the co-defendant's mother.[1216] The victim was killed when Duplantis went to check on the house, which was then occupied by his ex-

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[1205] 616 So. 2d 313 (Miss. 1993).
[1206] *Hurns*, 616 So. 2d at 314-15.
[1207] *Id.* at 315.
[1208] *Id.*
[1209] *Id.* at 316.
[1210] *Id.* at 321.
[1211] *Id.*
[1212] *Id.*
[1213] 644 So. 2d 1235 (Miss. 1994).
[1214] *Duplantis*, 644 So. 2d at 1238.
[1215] *Id.* at 1247, 1252.
[1216] *Id.* at 1247-48. The facts contained in this sentence are of the other crimes, not the murder at issue in this case.

wife.[1217] Duplantis sought to exclude the evidence of the other crimes by a motion *in limine*, but the trial judge reserved ruling until trial.[1218] The rulings at trial were that the evidence of the escape and of the breaking into and thefts from the business were admissible.[1219] The supreme court reviewed the use of other crimes' evidence and affirmed.[1220] The evidence of the escape was needed to explain the actions of the parties involved and to give a coherent story of the events.[1221] The burglary and thefts were relevant to explain the presence of the food at the house and to show the source of the tool which Duplantis used to kill the victim.[1222] The reasons listed above were relevant "other purposes" under Rule 404(b).[1223]

Davis v. State[1224]

Davis was convicted of capital murder and sentenced to death.[1225] The suspected weapon used to murder the victim was a .22 pistol, stolen in a burglary of a home.[1226] The gun was identified as belonging to that home owner and was found near the stolen getaway car and other items connected to Davis.[1227] On appeal, Davis complained of the state proving the other crime of burglary in the murder trial.[1228] This argument was rejected.[1229] The supreme court wrote that other crimes which are interrelated with the charged crime may be admissible.[1230] The other crime here was relevant on the issues of identity and opportunity, and to rebut Davis's attempt to forestall connecting himself to the gun.[1231]

[1217] *Id.*
[1218] *Id.* at 1246.
[1219] *Id.*
[1220] *Id.* at 1248.
[1221] *Id.*
[1222] *Id.*
[1223] *Id.*
[1224] 660 So.2d 1228 (Miss. 1995).
[1225] *Davis*, 660 So. 2d at 1233.
[1226] *Id.* at 1235-36.
[1227] *Id.* at 1236.
[1228] *Id.* at 1251-52.
[1229] *Id.*
[1230] *Id.* at 1251.
[1231] *Id.* at 1252.

Ballenger v. State[1232]

The defendant was convicted of the murder of her aunt and sentenced to death.[1233] The trial judge allowed the State to prove that after the victim was beaten, Ballenger and her accomplices left the place, then went back and set fire to it.[1234] Ballenger argued that it was error to allow the evidence of the fire as violative of the prohibition against use of other bad acts.[1235] The trial judge's decision was affirmed.[1236] The supreme court recited the numerous "other purposes" on which evidence of other crimes may be relevant and admissible.[1237] Here, the evidence was said to be relevant to show a complete and coherent story, including other crimes closely connected with that charged and to prove her intent to murder the victim, her knowledge of the crime and her identity.[1238]

Townsend v. State[1239]

When Townsend was stopped for running a red light, a search of his car yielded methamphetamine, marijuana and syringes.[1240] Townsend was only charged with and convicted of possession of the methamphetamine.[1241] The defense counsel in *voir dire* had cautioned the jury that this was only a trial about methamphetamine, not about marijuana.[1242] The trial court allowed the State to prove Townsend's possession of the marijuana and drug paraphernalia as being connected with the possession charged.[1243] This was affirmed.[1244] The supreme court held that evidence of other crimes which are closely connected with that charged are admissible in order to give the

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[1232] 667 So. 2d 1242 (Miss. 1996).
[1233] *Ballenger*, 667 So. 2d at 1242.
[1234] *Id.* at 1248.
[1235] *Id.* at 1256.
[1236] *Id.* at 1257.
[1237] *Id.* at 1256-57.
[1238] *Id.* at 1257.
[1239] 681 So. 2d 504 (Miss. 1996).
[1240] *Townsend*, 681 So. 2d at 499-500.
[1241] *Id.* at 499.
[1242] *Id.* at 505.
[1243] *Id.* at 506.
[1244] *Id.* at 507.

jury all the facts about the crime charged—the "whole story."[1245] The court made reference to the pre-rule concept of allowing such evidence because it is a part of the *res gestae*—the event to be proven.[1246] It was also commented that defense counsel had effectively opened the door to the evidence by referring to marijuana in *voir dire*.[1247]

Justice Banks, concurring, points out that the idea of evidence of a *res gestae* does not exist in the rules and that it is unwise to return it to recognition because it obfuscates the issue of the admissibility of any evidence which must be relevant because of its relationship to the issues being tried.[1248]

Jackson v. State[1249]

The defendants were convicted of possession with intent to distribute after they were stopped in a narcotics search on the coast.[1250] It is not clear, but apparently at the time of the search, the defendants did not stop immediately.[1251] At trial, an officer testified to the defendants' failure to yield, resisting arrest, reckless driving, and to the presence of alcoholic beverages in the car.[1252] The defendants complained of the introduction of this "bad act" evidence.[1253] The supreme court affirmed, holding that the evidence was admissible, being so interrelated to the crime charged, as to form a single transaction or closely related series of transactions.[1254]

[1245] *Id.*
[1246] *Id.*
[1247] *Id.* at 506.
[1248] *Id.* at 510-11 (Banks, J., concurring).
[1249] 689 So. 2d 760 (Miss. 1997).
[1250] *Jackson*, 689 So. 2d at 762.
[1251] *Id.* at 768.
[1252] *Id.*
[1253] *Id.*
[1254] *Id.*

De la Beckwith v. State[1255]

In 1994, De la Beckwith was convicted of the 1963 murder of civil rights leader Medger Evers.[1256] The State was permitted to introduce letters written by the defendant and a page from the manuscript of a book which showed his hostility toward the black race, his approval of the assassination of JFK, and his involvement in the Klu Klux Klan.[1257] The supreme court hinted that such evidence would fall under Rule 404(b) as "other acts," relevant to prove motive, although the court stressed the application of Rule 401 for relevancy.[1258]

A Louisiana prison guard was allowed to testify that while he was guarding the defendant in Angola prison in 1979, De la Beckwith admitted to killing Evers.[1259] De la Beckwith's conviction for which he was then imprisoned was later reversed as unconstitutional.[1260] De la Beckwith argued it was error to show his conviction of another crime when that crime was later reversed.[1261] The trial court's allowance of the evidence was affirmed.[1262] The supreme court noted that the evidence was not offered to impeach, but merely to show the relationship of the witness with the defendant.[1263] No details of the other crime were revealed, so no similarity between that crime and this one was proven and the prejudicial effect was minimal.[1264]

Underwood v. State[1265]

[1255] 94-KA-00402-SCT, 707 So. 2d 547 (Miss. 1997); *see infra* notes 1565-71 and accompanying text for a discussion of another evidentiary issue of this case.

[1256] *De la Beckwith*, ¶¶ 1-2, 707 So. 2d at 554.

[1257] *Id.* ¶¶ 123-24, 707 So. 2d at 578-79.

[1258] *Id.* ¶ 125, 707 So. 2d at 579-80.

[1259] *Id.* ¶ 133, 707 So. 2d at 581.

[1260] *Id.*

[1261] *Id.* ¶ 134, 707 So. 2d at 581.

[1262] *Id.* ¶ 138, 707 So. 2d at 582.

[1263] *Id.* ¶ 136, 707 So. 2d at 581.

[1264] *Id.* ¶ 137, 707 So. 2d at 581-82.

[1265] 95-DP-00866-SCT, 708 So. 2d 18 (Miss. 1998); *see supra* notes 1080-86 and accompanying text for a recitation of the facts and discussion of this case.

Edwards v. State[1266]

Edwards, armed with a stick, went to the house where the victim and others were with Edwards's girlfriend.[1267] Edwards proceeded to hit the victim and another witness with the stick.[1268] For this, Edwards was convicted of aggravated assault.[1269] The other witness testified without objection that Edwards had the stick in his hands and that, when the witness's back was turned, he was hit with the stick, which then broke.[1270] When the State offered the pieces of the stick as evidence, the defense objected on grounds that the evidence proved a crime other than that charged.[1271] The court of appeals affirmed the trial courts allowance of the evidence, reciting the now familiar litany that other crimes interrelated in time, place and fact to that charged crime are admissible to tell the full story.[1272]

Levy v. State[1273]

Levy was convicted of raping a twelve-year-old girl in August of 1994.[1274] The victim told a cousin about it, but did not report it to her mother.[1275] A year later, Levy approached the victim again and asked her to have sex with him, to which she refused.[1276] This time, she chose to report the rape, which led to Levy's prosecution.[1277] Levy complained that allowing the victim to testify about the solicitation a year after the rape was error because it was evidence of another crime under Rule 404(b).[1278] This argument was rejected; the court of appeals ruled that the evidence was admissible to tell a complete, ratio-

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[1266] 96-KA-01157-COA, 723 So. 2d 1221 (Miss. Ct. App. 1998).
[1267] *Edwards*, ¶¶ 3-4, 723 So. 2d at 1223.
[1268] *Id.* ¶ 4, 723 So. 2d at 1223.
[1269] *Id.* ¶ 8, 723 So. 2d at 1224.
[1270] *Id.* ¶¶ 27-29, 723 So. 2d at 1228.
[1271] *Id.* ¶ 29, 723 So. 2d at 1228.
[1272] *Id.* ¶¶ 35-36, 723 So. 2d at 1230.
[1273] 97-KA-00230-COA, 724 So. 2d 405 (Miss. Ct. App. 1998).
[1274] *Levy*, ¶ 2, 724 So. 2d at 407.
[1275] *Id.* ¶ 3, 724 So. 2d at 407.
[1276] *Id.* ¶ 4, 724 So. 2d at 407.
[1277] *Id.*
[1278] *Id.* ¶ 11, 724 So. 2d at 407.

nal story.[1279]

Bell v. State[1280]

Bell was convicted of murdering a country store clerk during a robbery and was sentenced to death.[1281] Bell's buddies, who were with him at the time of the crime, testified that immediately after the shooting, Bell threatened to shoot one of them so that there would be no witnesses.[1282] Bell argued this was inadmissible evidence of other crimes or wrongs.[1283] The supreme court affirmed the admittance of the testimony, holding that the threats were interrelated to the murder and showed Bell's fear of being caught.[1284]

Saunders v. State[1285]

Bennett v. State[1286]

Jamison v. State[1287]

Jamison was convicted of selling cocaine as a habitual offender.[1288] At the time of the buy, Jamison was not immediately arrested.[1289] At trial, a detective was permitted to explain that Jamison was not immediately arrested because the officers were running an operation in which informants and undercover agents were making buys from several dealers in the area.[1290] The detective said they did not want to compro-

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[1279] *Id.*

[1280] 93-DP-00189-SCT, 725 So. 2d 836 (Miss. 1998).

[1281] *Bell*, ¶¶ 1-2, 725 So. 2d at 840-41.

[1282] *Id.* ¶ 4, 725 So. 2d at 841.

[1283] *Id.* ¶ 35, 725 So. 2d at 850.

[1284] *Id.* ¶¶ 36-37, 725 So. 2d at 850-51.

[1285] 97-KA-00657-COA, 733 So. 2d 325 (Miss. Ct. App. 1998); *see supra* notes 827-40 and accompanying text for a recitation of the facts and discussion of this case.

[1286] 97-KA-01541-COA, 738 So. 2d 300 (Miss. Ct. App. 1999); *see supra* notes 1106-12 and accompanying text for a recitation of the facts and discussion of this case.

[1287] 98-KA-00683-COA, 741 So. 2d 359 (Miss. Ct. App. 1999).

[1288] *Jamison*, ¶ 1, 741 So. 2d at 360.

[1289] *Id.* ¶ 4, 741 So. 2d at 361.

[1290] *Id.* ¶ 23, 741 So. 2d at 364-65.

mise those informants and agents by premature arrests of some of the dealers.[1291] Jamison argued this was evidence of other criminal conduct which was unconnected to him, yet still prejudicial.[1292] Jamison's argument was rejected by the court of appeals.[1293] The testimony did not link him to other crimes and was a relevant explanation of the reason for his delayed arrest—admissible for another purpose under Rule 404(b).[1294]

Anderson v. State[1295]

Anderson was convicted of burglary of a dwelling with intent to kidnap.[1296] The victim testified that Anderson gained entry to her house by posing as a police officer, forced her into her car and shot her when she tried to escape.[1297] The statute of limitations had run on the impersonation and assault charges by the time Anderson was identified as her kidnapper.[1298] The trial judge allowed the evidence of the impersonation and the shooting.[1299] The judge's ruling was affirmed by the court of appeals over an argument that the evidence was of other crimes, also barred by the statute of limitations.[1300] The court of appeals held that the crimes involved in the burglary were relevant as interrelated to the crime charged and also to prove intent.[1301]

Turnage v. State[1302]

Turnage was convicted of fondling a nine-year-old child.[1303] The abuse occurred when Turnage had the victim and another girl with him and he fondled both of them at the

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[1291] *Id.* ¶ 24, 741 So. 2d at 365.
[1292] *Id.* ¶ 25, 741 So. 2d at 365.
[1293] *Id.*
[1294] *Id.*
[1295] 97-KA-00642-COA, 749 So. 2d 284 (Miss. Ct. App. 1999).
[1296] *Anderson*, ¶ 1, 749 So. 2d at 284.
[1297] *Id.* ¶¶ 2-3, 749 So. 2d at 284.
[1298] *Id.* ¶ 5, 749 So. 2d at 285.
[1299] *Id.* ¶ 7, 749 So. 2d at 285.
[1300] *Id.*
[1301] *Id.* ¶ 14, 749 So. 2d at 286.
[1302] 97-KA-01618-COA, 752 So. 2d 1049 (Miss. Ct. App. 1999).
[1303] *Turnage*, ¶ 1, 752 So. 2d at 1050.

same time.[1304] The other girl testified in the State's case-in-chief about what Turnage did to the victim of this crime, not mentioning what he did to her.[1305] When Turnage testified, the State crossed him about fondling the other girl also, which he denied.[1306] The State was allowed to recall the other girl in rebuttal to testify that Turnage also abused her at the same time.[1307] The defendant's claims of error were that the crime against the other girl was inadmissible under Rule 404(b) and that it was not proper rebuttal evidence.[1308] The court of appeals affirmed the ruling, recognizing that ordinarily the sexual abuse of another person is not admissible in the trial involving a particular victim.[1309] Further, the court recognized that the State cannot open the door for otherwise irrelevant evidence by cross of the defendant.[1310] However, the court held that the evidence here was not of other remote acts, but was part of the same interrelated event, therefore admissible to show the complete story.[1311]

Price v. State[1312]

In convicting Price of felony DUI, the State was permitted to prove that at the time of his arrest, Price was driving with a suspended license.[1313] This ruling was affirmed by the court of appeals.[1314] Without referring to Rule 404(b), the court held that the evidence of the other crime was so interconnected with the alleged crime as to be a single criminal transaction.[1315]

[1304] *Id.* ¶ 3, 752 So. 2d at 1051.
[1305] *Id.* ¶ 5, 752 So. 2d at 1051.
[1306] *Id.*
[1307] *Id.*
[1308] *Id.* ¶ 6, 752 So. 2d at 1051-52.
[1309] *Id.* ¶ 7, 752 So. 2d at 1052.
[1310] *Id.*
[1311] *Id.* ¶ 14, 752 So. 2d at 1054.
[1312] 98-KA-00147-COA, 752 So. 2d 1070 (Miss. Ct. App. 1999).
[1313] *Price*, ¶ 20, 752 So. 2d at 1076.
[1314] *Id.* ¶ 22, 752 So. 2d at 1076.
[1315] *Id.*

Holmes v. State[1316]

Holmes was convicted of aggravated assault as the result of a shoot-out in Belzoni.[1317] Police officers were allowed to show pictures of the scene and describe the damage done to the victim's automobile.[1318] The court of appeals rejected Holmes's claim that this was inadmissible evidence of other crimes.[1319] The evidence was held to be admissible as part of interrelated events in order to tell the total, rational and coherent story.[1320]

Smothers v. State[1321]

Smothers was convicted of a murder, connected to a drug-related rampage by him and two others which left three people, apparently all dealers, dead.[1322] The State was allowed to prove through a co-defendant who turned state's evidence that Smothers shot the victim while the victim was driving a car.[1323] The witness testified that Smothers immediately shot another person who was in the passenger seat.[1324] The group proceeded to kill the third victim at another time and place; however, this evidence was not shown in this trial.[1325] Smothers claimed error in allowing the "other crimes" evidence.[1326] The trial court's ruling was affirmed by the court of appeals.[1327] The evidence was held to be admissible as part of the interrelated events which showed the jury a complete and coherent story.[1328] The evidence also had probative value about the path of the bullets and the distance of the shooter, which rebutted Smothers's claim that his co-indictee, in the

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[1316] 1998-KA-01122-COA, 754 So. 2d 529 (Miss. Ct. App. 1999).
[1317] *Holmes*, ¶ 2, 754 So. 2d at 539.
[1318] *Id.* ¶¶ 26-27, 754 So. 2d at 538-39.
[1319] *Id.* ¶ 27, 754 So. 2d at 538-39.
[1320] *Id.*
[1321] 98-KA-00005-COA, 756 So. 2d 779 (Miss. Ct. App. 1999).
[1322] *Smothers*, ¶¶ 2-3, 756 So. 2d at 782.
[1323] *Id.* ¶ 5, 756 So. 2d at 782.
[1324] *Id.*
[1325] *Id.* ¶¶ 6-7, 756 So. 2d at 782-83.
[1326] *Id.* ¶ 1, 756 So. 2d at 782.
[1327] *Id.* ¶ 15, 756 So. 2d at 784-85.
[1328] *Id.*

back seat, shot the victims.[1329]

Ainsworth v. State[1330]

Odom v. State[1331]

After a bizarre judicial history beginning in 1978, this case was tried for the second time in 1998, with Odom being found guilty of murder.[1332] Odom was originally charged in 1978 with capital murder because the crime occurred during an alleged robbery.[1333] That jury found him guilty of murder, but not capital murder, which amounted to an acquittal of the robbery allegation.[1334] He was granted a new trial by the trial judge; however, he decided to plead guilty.[1335] He later escaped from prison and was caught, convicted of rape in Tennessee and sentenced to life there.[1336] In 1995, a United States District Court found his guilty plea to be constitutionally defective and ordered a new trial on the Mississippi murder charge.[1337] At the 1998 trial, the trial judge allowed the State to show the physical evidence taken from the murder scene and Odom at the time of capture.[1338] The State also used Odom's confessions.[1339] Odom confessed to taking a gun and money from the victim's home; thus, he confessed to the robbery.[1340]

Odom claimed on appeal that it was error to allow proof of the robbery in the murder trial.[1341] This argument was rejected by the supreme court.[1342] The evidence from the crime

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[1329] *Id.*

[1330] 98-KA-00601-COA, 756 So. 2d 826 (Miss. Ct. App. 2000); *see supra* notes 169-79 for a recitation of the facts and discussion of this case.

[1331] 1998-KA-01281-COA, 769 So. 2d 189 (Miss. 2000).

[1332] *Odom*, ¶ 1, 769 So. 2d at 191.

[1333] *Id.*

[1334] *Id.* ¶ 2, 769 So. 2d at 192.

[1335] *Id.*

[1336] *Id.* ¶ 3, 769 So. 2d at 192.

[1337] *Id.*

[1338] *Id.* ¶ 13, 769 So. 2d at 194-95.

[1339] *Id.* ¶ 15, 769 So. 2d at 195.

[1340] *Id.* ¶ 14, 769 So. 2d at 195.

[1341] *Id.* ¶ 9, 769 So. 2d at 194. He also made an unsuccessful double jeopardy argument. *Id.*

[1342] *Id.* ¶ 14, 769 So. 2d at 195.

scene was an interrelated event connected with the murder.[1343] The evidence proved Odom was at the scene of the murder and corroborated his confessions.[1344] It was not highly prejudicial because the crime of robbery is not similar to the crime of murder.[1345]

Potts v. State[1346]

Potts burglarized a house, stole a VCR and then traded the VCR for crack.[1347] Witnesses established that Potts got the crack in exchange for the VCR.[1348] Potts claimed it was error to allow evidence of his crack possession and use.[1349] The trial court's ruling was affirmed by the court of appeals.[1350] There was no objection at trial, so the error was waived; however, the appellate court considered the merits anyway.[1351] The evidence was held to be part of the interrelated events because it led the police to the VCR and allowed the police to connect Potts to the VCR and the burglary.[1352] The evidence was also relevant to establish a motive for the burglary.[1353]

Hall v. State[1354]

A policeman on night surveillance of an apartment complex's parking lot watched Hall and his buddy, who turned state's evidence, go to a white car and leave it with the door partially open.[1355] The officer called in three other police officers and they watched the same pair enter another car.[1356] The pair left that car when a person drove into the lot and they

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[1343] *Id.* ¶¶ 13-14, 769 So. 2d at 194-95.
[1344] *Id.*
[1345] *Id.* ¶ 14, 769 So. 2d at 195.
[1346] 1999-KA-00033, 759 So. 2d 500 (Miss. Ct. App. 2000).
[1347] *Potts*, ¶¶ 2-4, 759 So. 2d at 501-02.
[1348] *Id.* ¶¶ 3-4, 759 So. 2d at 501-02.
[1349] *Id.* ¶ 1, 759 So. 2d at 501.
[1350] *Id.*
[1351] *Id.* ¶ 8, 759 So. 2d at 502.
[1352] *Id.* ¶¶ 9-10, 759 So. 2d at 503.
[1353] *Id.* ¶ 10, 759 So. 2d at 503.
[1354] 1999-KA-00079-COA, 760 So. 2d 817 (Miss. Ct. App. 2000).
[1355] *Hall*, ¶ 2, 760 So. 2d at 818.
[1356] *Id.* ¶ 3, 760 So. 2d at 818.

were subsequently caught and arrested by the officers.[1357] One of the perpetrators had a pair of wire cutters.[1358] On appeal from his auto burglary conviction, Hall complained of the introduction of the evidence about the first white car as showing unconvicted and uncharged other misconduct.[1359] This argument was rejected by the court of appeals.[1360] The court held that the event was part of the various acts observed by the officers and was relevant to show why the officer observed them and called for assistance.[1361] The State had the right to tell a rational and coherent story of what happened.[1362]

Weathersby v. State[1363]

Weathersby was convicted of armed robbery and business burglary.[1364] Weathersby had captured a woman and a man at a business late at night, bound them and guarded them for almost two hours while his two friends stole goods from their business.[1365] The woman victim was allowed to testify that while Weathersby guarded them he threatened to rape her and that he had eventually committed two acts of sexual battery on her.[1366] Weathersby claimed this introduction violated Rule 404 as evidence of "other acts".[1367] This argument was rejected by the court of appeals.[1368] The evidence was part of the "inextricably intertwined" events of the very crime for which he was charged, and was further evidence of the violence which put the victim in fear—a necessary element to prove robbery by force.[1369]

[1357] *Id.*
[1358] *Id.*
[1359] *Id.* ¶ 10, 760 So. 2d at 819.
[1360] *Id.* ¶ 11, 760 So. 2d at 819.
[1361] *Id.*
[1362] *Id.*
[1363] 1999-KA-00702-COA, 769 So. 2d 857 (Miss. Ct. App. 2000).
[1364] *Weathersby*, ¶ 1, 769 So. 2d at 857-58.
[1365] *Id.* ¶¶ 2-3, 769 So. 2d at 858.
[1366] *Id.* ¶ 5, 769 So. 2d at 858.
[1367] *Id.*
[1368] *Id.* ¶ 11, 769 So. 2d at 859.
[1369] *Id.* ¶ 8, 769 So. 2d at 859.

Westbrook v. State[1370]

Westbrook was convicted on two counts of selling less than an ounce of marijuana to a jail trustee.[1371] The trustee informed the deputies that another trustee had made arrangements with Westbrook to buy some marijuana; thus, the authorities set the stage for this trustee to make a buy.[1372] When Westbrook made the sale, he took the marijuana he was selling to the trustee from a larger bag he had in his car.[1373] This was introduced into evidence.[1374] Westbrook argued that since he was not charged with the possession of the large bag of marijuana, it should not have been admitted into evidence.[1375] The court of appeals held that this was not another crime, but was a closely intertwined event which the State could show in proving the crime charged; thus, the ruling was affirmed.[1376]

King v. State[1377]

King was convicted of armed robbery after he entered the victim's car, robbed the victim, then attempted to rob the other occupants of the victim's car.[1378] The State was allowed to show that King, after taking the money from the victim at gun point, then moved to the other occupants and tried to rob them.[1379] This evidentiary allowance was affirmed over King's argument that this was evidence of other crimes.[1380] The evidence of the attempted robberies of the other people was closely connected to and a part of the very crime being tried, and additionally supported their ability to identify King as the robber.[1381]

[1370] 1999-KA-01064-COA, 770 So. 2d 1038 (Miss. Ct. App. 2000).
[1371] *Westbrook*, ¶ 1, 770 So. 2d at 1039.
[1372] *Id.* ¶ 2, 770 So. 2d at 1039.
[1373] *Id.* ¶ 3, 770 So. 2d at 1039.
[1374] *Id.* ¶ 8, 770 So. 2d at 1040.
[1375] *Id.*
[1376] *Id.* ¶ 9, 770 So. 2d at 1040.
[1377] 1999-KA-01770-COA, 772 So. 2d 1076 (Miss. Ct. App. 2000).
[1378] *King*, ¶¶ 1-2, 772 So. 2d at 1077.
[1379] *Id.* ¶ 3, 772 So. 2d at 1077.
[1380] *Id.* ¶¶ 4-5, 772 So. 2d at 1077-78.
[1381] *Id.*

Kelly v. State[1382]

Reynolds v. State[1383]

Reynolds was convicted of murder and possession of a firearm by a convicted felon.[1384] The State was allowed to show that before Reynolds shot the victim, he had pointed his gun at the head of a witness who was with the victim and ordered him to leave the area.[1385] The introduction of this evidence was affirmed by the supreme court.[1386] The other act was relevant to prove Reynolds's possession of the gun, his preparation and intent, and was part of the same transaction.[1387]

2. Predisposition in Rebuttal of the Entrapment defense

This was a common law justification for admitting evidence of other crimes committed by the defendant. The defendant, claiming entrapment, argues that he was of an innocent state of mind and would not have committed the offense had the state agents not induced him or her to do so. The rule is presently that if the defendant presents *prima facie* evidence of entrapment, then the burden falls on the State to produce evidence of predisposition to commit the crime, rebutting the claim of innocent mind and State inducement. The defendant's character to commit the crime thus becomes an essential element of the State's case, and failure to present evidence of predisposition results in a directed verdict for the defendant. One way to show the defendant's predisposition is to show that he committed that type of crime before and was therefore predisposed to commit the crime, making the defendant's character an essential element of the charged crime.

The most regular use of this kind of evidence is in drug

[1382] 98-KA-00726-COA, 783 So. 2d 744 (Miss. Ct. App. 2000); *see supra* notes 869-78 and accompanying text for a recitation of the facts and discussion of this case.

[1383] 1999-KA-01463-SCT, 784 So. 2d 929 (Miss. 2001).

[1384] *Reynolds*, ¶ 1, 784 So. 2d at 930-31.

[1385] *Id.* ¶ 6, 784 So. 2d at 931.

[1386] *Id.* ¶ 8, 784 So. 2d at 932.

[1387] *Id.*

distribution cases in which prior dealing by the defendant is allowed to show predisposition to sell, usually in rebuttal of an entrapment claim. That the defendant committed that type of crime before to show his predisposition is logically nothing more than showing the defendant's prior conduct to show he acted in conformity with it, contrary to the Rule 404(a) exclusion of evidence. This should properly be an exception to Rule 404(a).

Defense attorneys should be cautious about raising entrapment early in the trial. In *Hopson v. State*,[1388] and *Sanders v. State*,[1389] defense counsel, in their opening statements or in their pre-trial conferences, claimed the entrapment defense.[1390] In the State's case-in-chief, the State was permitted to prove prior similar crimes to rebut the entrapment claim.[1391] During the trial, the defendant was never able to present any evidence supporting the defense.[1392] Admission of the other crimes evidence was held proper because the defendant had raised that defense, allowing the court and prosecution to rely on what defense counsel claimed.[1393]

CASES:

Bosarge v. State[1394]

The defendants were convicted of several crimes involving the distribution of drugs.[1395] They were caught in a sting involving a Mississippi Bureau of Narcotics confidential informant and an undercover agent.[1396] Defendants claimed that the marijuana which they sold was supplied to them by the informant and then was to be bought by the undercover

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[1388] 625 So. 2d 395 (Miss. 1993); *see infra* notes 1402-07 and accompanying text.

[1389] 678 So. 2d 663 (Miss. 1996); *see infra* notes 1408-16 and accompanying text.

[1390] *Sanders*, 678 So. 2d at 666, 668; *Hopson*, 625 So. 2d at 399.

[1391] *Sanders*, 678 So. 2d at 668; *Hopson*, 625 So. 2d at 399.

[1392] *Sanders*, 678 So. 2d at 668; *Hopson*, 625 So. 2d at 399.

[1393] *Sanders*, 678 So. 2d at 668; *Hopson*, 625 So. 2d at 400-01.

[1394] 594 So. 2d 1143 (Miss. 1991).

[1395] *Bosarge*, 594 So. 2d at 1143.

[1396] *Id.* at 1144.

agent.[1397] Courts have generally found this supply and buy type of operation to be a form of presumptive entrapment, requiring strong proof of predisposition.[1398] The State showed that the location of these events was set up as a base for drug dealing, there were other drugs hidden at the site and one of the defendants attempted to escape when the trap was sprung.[1399] There were no issues raised as to the admissibility of that evidence.[1400] This evidence of other crimes showing their predisposition was sufficient to overcome the defense's claim of entrapment.[1401]

Hopson v. State[1402]

At the beginning of his drug trial, Hopson claimed entrapment.[1403] However, during the course of the trial Hopson did not admit the crime, but rather denied it.[1404] The State was permitted to show his prior unrelated drug conduct even though the trial judge eventually refused his entrapment instruction because he never admitted the crime and because he offered no evidence of government inducement to commit the crime.[1405] Admitting the "other crimes" evidence was affirmed by the supreme court because the claim of entrapment was made by Hopson and the State should be allowed to show his predisposition to commit the crime.[1406] The court incidentally modified the previous rule that a defendant had to admit the crime in order to claim entrapment, to now allow that defense even when the defendant denies elements of the crime.[1407]

[1397] *Id.*
[1398] *Id.* at 1146.
[1399] *Id.* at 1147.
[1400] *Id.*
[1401] *Id.*
[1402] 625 So. 2d 395 (Miss. 1993).
[1403] *Hopson*, 625 So. 2d at 399.
[1404] *Id.*
[1405] *Id.*
[1406] *Id.* at 400-01.
[1407] *Id.* at 400.

Sanders v. State[1408]

Sanders was convicted of possession of cocaine with the intent to deliver.[1409] While discussing the admission of the evidence of prior drug transactions, defense counsel advised the judge and prosecutor that defense counsel was relying on the entrapment defense.[1410] The trial judge gave an entrapment instruction after this request.[1411] Sanders did not testify nor offer any evidence to support his claim of entrapment.[1412] The State was allowed to prove prior instances of Sanders selling drugs to rebut any claim of entrapment and to show predisposition.[1413] The trial judge's decision was affirmed by the supreme court.[1414] The supreme court observed that Sanders had raised the defense and gotten the instruction, allowing the trial court and the prosecutor to rely on those representations.[1415] The prior sales were relevant to rebut that defense.[1416] The court does not mention this rule as the basis for the holding.

Robert v. State[1417]

Robert was arrested after a drug sting in which a confidential informant and an undercover agent bought drugs from him.[1418] Robert claimed entrapment because the state actors had supplied him the drugs and then bought from him.[1419] The State was permitted to show several instances of Robert's prior drug sales.[1420] Robert never raised Rule 404 specifically, but argued error in admitting evidence of his predisposition to deal drugs.[1421] Without mentioning Rule 404(b) the court of

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[1408] 678 So. 2d 663 (Miss. 1996).
[1409] *Sanders*, 678 So. 2d at 665.
[1410] *Id.* at 666.
[1411] *Id.* at 666-67.
[1412] *Id.* at 667.
[1413] *Id.* at 668.
[1414] *Id.*
[1415] *Id.*
[1416] *Id.*
[1417] 1998-KA-01769-COA, 756 So. 2d 806 (Miss. Ct. App. 1999).
[1418] *Robert*, ¶ 3, 756 So. 2d at 807.
[1419] *Id.* ¶ 4, 756 So. 2d at 807.
[1420] *Id.* ¶¶ 5-7, 756 So. 2d at 807-08.
[1421] *Id.* ¶ 8, 756 So. 2d at 808.

appeals affirmed the trial court's decision on this point, because Robert raised the defense, inviting evidence of his predisposition.[1422]

Williams v. State[1423]

In his trial for sale of marijuana, Williams claimed entrapment.[1424] The trial judge permitted proof that ten years earlier, Williams had pled guilty and was subsequently convicted of a misdemeanor possession charge.[1425] The State was also allowed to prove the felony indictment for possession with intent which led to that misdemeanor plea.[1426] These past wrongs were apparently allowed to show predisposition to rebut the entrapment defense.[1427] Williams had complained that the evidence should be excluded because the State did not disclose in discovery that it intended to use such evidence.[1428] However, the court of appeals ruled that this issue had been waived because Williams never sought a continuance, much less a mistrial.[1429] The court held that admitting the old misdemeanor conviction and the indictment was harmless error.[1430]

Upon review by the supreme court, the court of appeals' decision was reversed.[1431] The supreme court agreed that the conviction for possession was not relevant to predisposition and that the indictment was not proof of any crime.[1432] Since the dispositive issue at trial was his predisposition to sell drugs, this evidence was prejudicial and the error was harmful.[1433]

[1422] *Id.*
[1423] 97-CT-01429-SCT, 761 So. 2d 149 (Miss. 2000).
[1424] *Williams*, ¶ 1, 761 So. 2d at 150.
[1425] *Id.* ¶ 7, 761 So. 2d at 151.
[1426] *Id.*
[1427] *Id.*
[1428] *Id.* ¶ 9, 761 So. 2d at 151.
[1429] *Id.* ¶ 12, 761 So. 2d at 152.
[1430] *Id.* ¶ 8, 761 So. 2d at 151.
[1431] *Id.* ¶ 18, 761 So. 2d at 154.
[1432] *Id.*
[1433] *Id.*

Tran v. State[1434]

Tran was convicted of selling crack to a confidential informant.[1435] Tran claimed entrapment and the State was allowed to show his prior involvement in drug activities.[1436] This was affirmed as admissible to show his predisposition in order to rebut the entrapment defense.[1437]

3. Lustful Disposition Toward That Victim of a Sex Crime

It has long been the rule that in sex abuse cases, whether the victim is a child or an adult, it is permitted to show that the defendant has, on other occasions, sexually abused the victim or otherwise acted to show a lustful disposition toward that victim. However, prior acts of sexual abuse are not admissible to show that the defendant so acted toward *another* person other than the victim of the charged crime. The stated rationale is that such sexual conduct proves a lustful disposition toward that specific victim; however, such conduct toward another person does not so show. The following cases will demonstrate this rule.

This is another common law purpose for "other crimes" evidence which should be an exception to the exclusionary rule. Evidence that the defendant engaged in sexual conduct with this specific victim is admitted for the direct inference that, by having a lustful disposition toward this victim, he acted in conformity with that propensity in this case, therefore committing the crime *sub judice*. It is not being used for another purpose.

The Federal Rules of Evidence address this issue directly with Rules 413 through 415, which allow evidence of any sex crimes committed by the defendant against anyone to come in when the defendant is charged with sexual assault or child molestation.

Note should be taken of *Tompkins v. State*,[1438] where the

[1434] 2000-KA-00354-COA, 785 So. 2d 1112 (Miss. Ct. App. 2001).

[1435] *Tran*, ¶ 1, 785 So. 2d at 1114.

[1436] *Id.* ¶¶ 6-7, 785 So. 2d at 1115-16.

[1437] *Id.* ¶ 23, 785 So. 2d at 1119-20.

[1438] 1998-KA-01806-COA, 759 So. 2d 471 (Miss. Ct. App. 2000); *see infra* notes

court of appeals found error, though harmless, in allowing the State to prove an incident of sexual nature toward the victim which occurred after the charged crime.[1439] No reason was provided, but it can be logically reasoned that events after the charged crime cannot show a predisposition toward the girl at the time of the charged crime.

CASES:

Mitchell v. State[1440]

Mitchell was convicted of fondling a five-year-old girl.[1441] A witness was allowed to testify that the little girl had told her of Mitchell exposing himself to other children.[1442] The trial court's decision to allow this testimony into evidence was reversed by the supreme court for two reasons: One, because of the hearsay nature of the evidence and, two, because sexual conduct of the defendant with persons other than the victim is irrelevant to show a lustful disposition toward the victim, thus not becoming admissible as an "other purpose" under Rule 404(b).[1443]

Lovejoy v. State[1444]

Lovejoy was convicted of the capital rape of his daughter.[1445] The State was permitted to enter five photographs taken by Lovejoy of his daughter nude.[1446] The decision to allow the photographs into evidence was affirmed by the supreme court.[1447] The photographs showed the depravity of Lovejoy, his lustful disposition for the victim and also corroborated the victim's testimony about the photos being taken.[1448]

1487-93 and accompanying text.

[1439] *Tompkins*, ¶ 12, 759 So. 2d at 474.

[1440] 539 So. 2d 1366 (Miss. 1989).

[1441] *Mitchell*, 539 So. 2d at 1367.

[1442] *Id.*

[1443] *Id.* at 1369-72.

[1444] 555 So. 2d 57 (Miss. 1989).

[1445] *Lovejoy*, 555 So. 2d at 57-58.

[1446] *Id.* at 58-59.

[1447] *Id.* at 59.

[1448] *Id.*

Nicholson v. State[1449]

The supreme court noted that previous cases decided by the appellate courts had approved admission of other sexual acts by the defendant on the victim of the charged crime as showing a predisposition of the defendant towards sexual abuse of that person.[1450] This allowance was held not to extend to showing sexual misconduct towards other persons, or a general disposition to engage in sexual misconduct in general.[1451] Such evidence would be highly prejudicial and would involve the jury in deciding collateral disputes.[1452]

Lambert v. State[1453]

Lambert was convicted of fondling a child.[1454] Another girl was permitted, in rebuttal, to testify about Lambert fondling her on a different occasion.[1455] The court of appeals had reversed and this was affirmed by the supreme court.[1456] The supreme court followed precedent to the effect that evidence of other sexual acts are admissible if they were committed on the victim of the crime charged.[1457] This type of evidence shows lustful disposition toward the victim.[1458] Such evidence about misconduct with other girls is not admissible, being more prejudicial than probative.[1459]

Wiltcher v. State[1460]

Wiltcher was convicted of the capital rape of his ten-year-old step-granddaughter.[1461] The evidence issues of concern in

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[1449] 93-CT-01378-SCT, 704 So. 2d 81 (Miss. 1997); *see supra* notes 85-91 and accompanying text for a recitation of the facts and discussion of another evidentiary issue of this case.

[1450] *Nicholson*, ¶ 15, 704 So. 2d at 83.

[1451] *Id.* ¶¶ 15-16, 704 So. 2d at 83-84.

[1452] *Id.* ¶ 16, 704 So. 2d at 83-84.

[1453] 95-CT-00945-SCT, 724 So. 2d 392 (Miss. 1998).

[1454] *Lambert*, ¶ 1, 724 So. 2d at 393.

[1455] *Id.* ¶ 4, 724 So. 2d at 393-94.

[1456] *Id.* ¶ 9, 724 So. 2d at 395.

[1457] *Id.* ¶ 5, 724 So. 2d at 394.

[1458] *Id.*

[1459] *Id.*

[1460] 96-KA-00757-COA, 724 So. 2d 933 (Miss. Ct. App. 1998).

[1461] *Wiltcher*, ¶ 2, 724 So. 2d at 935.

the appeal mostly arose in connection with Wiltcher's claim of ineffective assistance of counsel.[1462] There was also a claim of error that the trial court had allowed into evidence other incidents of sexual abuse with the victim.[1463] The court of appeals summarily affirmed on this issue, noting other cases holding such evidence was relevant to a lustful disposition toward the victim.[1464]

Boggan v. State[1465]

Boggan was convicted of rape and sexual battery of his nine-year-old daughter.[1466] The daughter was allowed to testify to other sexual misconduct by Boggan with her.[1467] This allowance was affirmed by the court of appeals under the now familiar rule that other sexual contact with a rape victim is admissible to show a lustful disposition toward that victim.[1468]

Barbetta v. State[1469]

Barbetta was convicted of touching a child for lustful purposes.[1470] The State was permitted to show that the defendant had done a similar thing to the victim several years earlier.[1471] The court of appeals affirmed the trial court's decision to allow in the evidence.[1472] The appellate court cited the long line of cases in which prior sexual conduct with the same victim is admissible to show lustful disposition toward the victim.[1473]

[1462] *Id.* ¶ 3, 724 So. 2d at 935.
[1463] *Id.* ¶ 9, 724 So. 2d at 937.
[1464] *Id.*
[1465] 97-KA-01292-COA, 726 So. 2d 1236 (Miss. Ct. App. 1998).
[1466] *Boggan*, ¶ 2, 726 So. 2d at 1237.
[1467] *Id.* ¶¶ 2-3, 726 So.2 d at 1237.
[1468] *Id.* ¶ 5, 726 So. 2d at 1237-38.
[1469] 97-KA-00906-COA, 738 So. 2d 258 (Miss. Ct. App. 1999).
[1470] *Barbetta*, ¶ 1, 738 So. 2d at 259.
[1471] *Id.* ¶ 4, 738 So. 2d at 260.
[1472] *Id.* ¶ 8, 738 So. 2d at 261.
[1473] *Id.* ¶¶ 7-8, 738 So. 2d at 260-61.

Allen v. State[1474]

Allen was convicted of the capital rape of his step-daughter.[1475] Allen's step-daughter was permitted to testify about a long term sexual relationship between her and Allen, involving numerous instances of intercourse.[1476] The sexual relationship began when she was nine, and she finally told her real father about it when she was thirteen, which subsequently led to the indictment.[1477] After conviction, Allen complained on appeal that his counsel had failed to object to the testimony concerning the other instances of rape.[1478] The court of appeals observed that an objection would have been futile in view of the standing rule that other instances of sexual conduct with the same victim are admissible to prove lustful disposition toward that victim.[1479] Therefore, Allen's claim of ineffective assistance was denied.[1480]

Crawford v. State[1481]

Crawford was convicted of the capital rape of his twelve-year-old step-daughter.[1482] The State was permitted to show several instances of sexual battery upon the girl, which had occurred prior to the rape.[1483] This decision was affirmed by the supreme court.[1484] The court applied a two-step analysis in deciding that the evidence was admissible: One, the evidence must be relevant to prove a material issue other than defendant's character, and, two, it must be more probative than prejudicial.[1485] This evidence passed the test because it showed a lustful disposition toward the victim.[1486]

[1474] 97-KA-01450-COA, 749 So. 2d 1152 (Miss. Ct. App. 1999).
[1475] *Allen*, ¶ 1, 749 So. 2d at 1154.
[1476] *Id.* ¶ 2, 749 So. 2d at 1155.
[1477] *Id.*
[1478] *Id.* ¶ 8, 749 So. 2d at 1156.
[1479] *Id.*
[1480] *Id.* ¶ 17, 749 So. 2d at 1158.
[1481] 1998-KA-01578-SCT, 754 So. 2d 1211 (Miss. 2000).
[1482] *Crawford*, ¶ 2, 754 So. 2d at 1214.
[1483] *Id.* ¶¶ 21-22, 754 So. 2d at 1220.
[1484] *Id.* ¶ 24, 754 So. 2d at 1221.
[1485] *Id.* ¶ 23, 754 So. 2d at 1220-21.
[1486] *Id.*

Tompkins v. State[1487]

Tompkins was convicted of the capital rape of a thirteen-year-old girl.[1488] The State was permitted to show at trial that Tompkins had engaged in sexual acts with the girl several times previous to the charged rape.[1489] This evidence was held to be properly admitted as being relevant to Tompkins's lustful disposition toward the victim.[1490] The State was also allowed to prove that two months after the charged rape, Tompkins was caught in her bedroom at night with his pants down.[1491] Without discussion, the court of appeals held that admission of the evidence of a separate crime which had occurred after the charged crime to be error.[1492] However, the error was harmless because other evidence provided overwhelming proof of his guilt.[1493] In the opinion, there was no mention of a limiting instruction.

4. Guilty Knowledge/Coverup

The defendant's subsequent acts may show that the defendant held guilty knowledge of the crime or was engaged in covering up the charged crime. When such evidence is in the form of committing other criminal acts, it comes in under this rationale. Thus, if the defendant escapes, flees, destroys property to cover up a crime, or if he tells inconsistent stories to the police, this may be shown to be, in effect, an admission of that guilty knowledge.

If the evidence is of the defendant's flight, the State must show that the defendant was fleeing from prosecution of the crime charged. If he was involved in other crimes at that time from which he could have been fleeing, then the flight would not clearly infer guilty knowledge of the charged crime and, thus, should be excluded.

[1487] 1998-KA-01806-COA, 759 So. 2d 471 (Miss. Ct. App. 2000).
[1488] *Tompkins*, ¶ 2, 759 So. 2d at 473.
[1489] *Id.* ¶ 3, 759 So. 2d at 473.
[1490] *Id.* ¶¶ 8-9, 759 So. 2d at 474.
[1491] *Id.* ¶ 7, 759 So. 2d at 474.
[1492] *Id.* ¶ 12, 759 So. 2d at 474.
[1493] *Id.*

CASES:

Mariche v. State[1494]

Mariche was convicted of rape.[1495] Ten days after the crime, he fled from officers when they attempted to stop him in his car.[1496] This fact was admitted into evidence and affirmed by the supreme court.[1497] Flight which shows guilty knowledge, is admissible as an "other purpose" under Rule 404(b).[1498]

Mack v. State[1499]

The error regarding the evidence of Mack's flight was held to be harmless in view of the overwhelming weight of all other evidence.[1500]

Ballenger v. State[1501]

Brown v. State[1502]

Brown was convicted of triple-murder and sentenced to death.[1503] After Brown was arrested, the police asked him about his whereabouts on the night of the murders.[1504] Brown told them that he was nowhere near the scene of the murders, and that he had smoked some marijuana and drank beer with some friends that night.[1505] Then Mariche changed his story to conform with what his friends had told police later,

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[1494] 495 So. 2d 507 (Miss. 1986).

[1495] *Mariche*, 495 So. 2d at 507.

[1496] *Id.*

[1497] *Id.* at 508.

[1498] *Id.*

[1499] 650 So. 2d 1289 (Miss. 1994); *see supra* notes 783-91 and accompanying text for a recitation of the facts and a discussion of another evidentiary issue of this case.

[1500] *Mack*, 650 So. 2d at 1310.

[1501] 667 So. 2d 1242 (Miss. 1996); *see supra* notes 1232-38 and accompanying text for a recitation of the facts and discussion of this case.

[1502] 690 So. 2d 276 (Miss. 1996).

[1503] *Brown*, 690 So. 2d at 280.

[1504] *Id.* at 283.

[1505] *Id.*

that he had smoked crack, not marijuana, with them.[1506] The trial court refused to suppress this evidence, ruling it admissible to impeach Brown if he then testified.[1507] Brown elected not to testify.[1508] Affirming, the supreme court held there to be no abuse of discretion at the trial court level.[1509] The statements were relevant under Rule 404(b) to show the discrepancies in Brown's story.[1510] The evidence was not relevant to infer that he had acted in conformity to his character since this trial was not a drug related matter.[1511] There was no discussion by the supreme court of any "chilling effect" of the trial court's ruling.

Davis v. State[1512]

Davis was convicted of the armed robbery of a motel in Starkville.[1513] The State was allowed to prove that when Davis was in a house three days after the robbery, he fled, discarding a coat the victim later identified as one Davis was wearing during the robbery.[1514] Davis was also dressed in similar clothes at the time of his arrest.[1515] Davis claimed error due to the fact that, when he was located by the authorities, he was suspected of a different robbery, so the flight did not necessarily infer guilty knowledge of the instant robbery.[1516] The supreme court affirmed the trial court's decision to allow in this evidence.[1517] The court noted that evidence of flight is admissible under Rule 404(b) to prove guilty knowledge.[1518] There were earlier cases in which the defendant was charged with more than one crime, therefore, the flight did not

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[1506] *Id.*
[1507] *Id.* at 286.
[1508] *Id.*
[1509] *Id.*
[1510] *Id.*
[1511] *Id.*
[1512] 97-KA-00292-SCT, 722 So. 2d 143 (Miss. 1998).
[1513] *Davis*, ¶ 1, 722 So. 2d at 144.
[1514] *Id.* ¶¶ 3-4, 722 So. 2d at 144-45.
[1515] *Id.*
[1516] *Id.* ¶ 8, 722 So. 2d at 145-46.
[1517] *Id.* ¶ 10, 722 So. 2d at 146.
[1518] *Id.* ¶ 9, 722 So. 2d at 146.

clearly infer guilt of the one being tried, and was thus held inadmissible.[1519] The court distinguished this case by pointing to the corroborative identification evidence by the victim of the clothing Davis fled in.[1520]

Armstrong v. State[1521]

Armstrong was convicted of murder in a street shooting of a man he and others had previously confronted at a nightspot.[1522] Twelve hours after the shooting, the police in a nearby town saw the car driven by Armstrong and tried to stop him, however, Armstrong refused to stop.[1523] At that point, the police shot out all of his tires and confronted him with a shotgun.[1524] The gun Armstrong used in the shooting was found during a search of the area on the road near his car.[1525] This evidence was allowed in over Armstrong's motion *in limine* contesting the evidence of the police chase as being remote in time to the shooting.[1526] The trial judge ruled that it was relevant as to the "totality of circumstances."[1527] This ruling was affirmed by the court of appeals.[1528] The appellate court held that the evidence was proof of flight and admissible under Rule 404(b) to show a guilty state of mind.[1529] Further, it was more probative than prejudicial.[1530]

Baldwin v. State[1531]

Baldwin and his brother were convicted of murdering a woman.[1532] The State's theory was that the victim's husband hired the killers; however, the State was not able to prove the

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[1519] *Id.* ¶ 8, 722 So. 2d at 145-46.
[1520] *Id.* ¶ 9, 722 So. 2d at 146.
[1521] 1999-KA-01039-COA, 771 So. 2d 988 (Miss. Ct. App. 2000).
[1522] *Armstrong*, ¶¶ 2, 6, 771 So. 2d at 991.
[1523] *Id.* ¶¶ 8, 10, 771 So. 2d at 992.
[1524] *Id.* ¶ 11, 771 So. 2d at 992.
[1525] *Id.* ¶¶ 12-13, 771 So. 2d at 992.
[1526] *Id.* ¶ 34, 771 So. 2d at 996.
[1527] *Id.*
[1528] *Id.* ¶ 39, 771 So. 2d at 997.
[1529] *Id.*
[1530] *Id.*
[1531] 1999-KA-00812-SCT, 784 So. 2d 148 (Miss. 2000).
[1532] *Baldwin*, ¶ 12, 784 So. 2d at 153.

case against the husband.[1533] Most of the evidentiary issues in this trial centered on relevancy. Evidence that Baldwin threatened and intimidated another woman because he suspected her of having talked to the police was relevant in order to prove Baldwin's guilty knowledge.[1534]

5. Volunteered Reference to Defendant's Other Crimes

Sometimes a witness, or in one case a juror, may volunteer some statement or give a response to a misunderstood question which may show that the defendant had committed other crimes. In such instances, the appellate courts have always refused to reverse, excusing the prosecution from responsibility for the reference. In most of the cases, the trial judge took an appropriate remedial action to neutralize the impact of what the jury heard.

CASES:

Doby v. State[1535]

In this case, the reference to Doby's prior bad conduct came during *voir dire*.[1536] A juror, responding to a question from the judge, said that he had been on a jury which had tried Doby on a similar drug charge.[1537] In fact, the juror had been on the panel, but was not selected for the actual jury.[1538] The trial judge overruled defendant's motion for a mistrial and there was no request for an admonishment to the jury due to the fact that the juror was not actually selected for the jury.[1539] The supreme court was dissatisfied that the *voir dire* was not in the record, but affirmed Doby's conviction.[1540] The court expressed great concern about the jury panel hearing this

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[1533] *Id.* ¶ 39, 784 So. 2d at 159.
[1534] *Id.* ¶ 52, 784 So. 2d at 161.
[1535] 557 So. 2d 533 (Miss. 1990).
[1536] *Doby*, 557 So. 2d at 536.
[1537] *Id.*
[1538] *Id.*
[1539] *Id.*
[1540] *Id.* at 537.

reference to Doby's involvement in a similar crime.[1541] The proper remedy was to instruct and question the rest of the jury about the effect of the information.[1542] Since the defense did not request such a remedy, the supreme court would not reverse the motion for a mistrial.[1543]

Baine v. Sate[1544]

Baine argued that the introduction of other sexual molestation instances during the testimony of a child witness was inadmissible evidence of other crimes.[1545] The supreme court affirmed the trial court's decision to allow in the testimony.[1546] The court agreed with the trial judge that correcting the child witness would only have called attention to the issue.[1547] The State had tried to prevent the references, and in the opinion of the court no prejudice resulted.[1548]

Craft v. State[1549]

Two defendants were convicted of conspiracy to sell cocaine and one of them was found guilty of actually selling it.[1550] A confidential informant cooperated with the police, was wired for radio transmission and subsequently made the buy.[1551] On the stand, the informant was asked about the conversation with a defendant at the time of the buy.[1552] He said that the defendant had referred to "other rocks" purchased before as being powerful and that he wanted to get two more of the same.[1553] The objection to this testimony as unduly prejudi-

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[1541] *Id.*
[1542] *Id.*
[1543] *Id.*
[1544] 604 So. 2d 258 (Miss. 1992); *see supra* notes 1197-1204 and accompanying text for a recitation of the facts and discussion of another evidentiary issue of this case.
[1545] *Baine*, 604 So. 2d at 261.
[1546] *Id.* at 272.
[1547] *Id.*
[1548] *Id.*
[1549] 656 So.2d 1156 (Miss. 1995).
[1550] *Craft*, 656 So. 2d at 1159.
[1551] *Id.*
[1552] *Id.*
[1553] *Id.*

cial and, in addition, hearsay, was overruled.[1554] The supreme court noted that the prosecution did not intend to use this evidence as a reference to possible other crimes, and that the evidence was probative to show that the informant had been to the trailer before.[1555] The evidence was more probative than prejudicial, being only a single reference to the activities.[1556]

Gossett v. State[1557]

Two defendants were convicted of murder in a barroom brawl.[1558] The evidence showed that they had each shot the victim.[1559] A State's witness, unresponsive to the actual question asked, volunteered that the defendants had later shot at a friend of the victim.[1560] The trial judge immediately instructed the jurors to disregard the statement and polled them separately for their commitments that they would disregard it.[1561] The defense moved for a mistrial which was refused.[1562] The supreme court affirmed the trial court's decision not to grant a mistrial.[1563] The court observed that evidence of unconvicted other crimes was generally inadmissible, but since the testimony had not been solicited by the prosecutor, and because the trial judge applied appropriate remedial measures, there was no error.[1564]

[1554] *Id.* at 1165.
[1555] *Id.*
[1556] *Id.*
[1557] 660 So. 2d 1285 (Miss. 1995).
[1558] *Gossett*, 660 So. 2d at 1288.
[1559] *Id.*
[1560] *Id.* at 1290.
[1561] *Id.*
[1562] *Id.*
[1563] *Id.* at 1291.
[1564] *Id.*

De la Beckwith v. State[1565]

De la Beckwith appealed the trial court's decision not to declare a mistrial when a witness stated that during a ride to Parchman, the defendant had talked to her about some prior "bombings."[1566] The defense argued that this reference constituted inadmissible evidence of other crimes under Rule 404(b), and moved for a mistrial.[1567] The trial judge overruled the objection, denied the mistrial and told the prosecutor to "move along."[1568] Nothing more was said about any bombings.[1569] The supreme court found no reversible error because the State did not elicit the reference to bombing and the jury did not hear that De la Beckwith was involved.[1570] The error, if any, was held to be harmless.[1571]

Hobson v. State[1572]

Baldwin v. State[1573]

Baldwin was convicted of selling crack to an undercover agent during a drug bust set up by a confidential informant.[1574] The informant, in her testimony, made reference to having bought some pills from Baldwin some years before the transaction in question.[1575] The introduction of this "other crimes" evidence was held by the supreme court to be erroneously admitted, but the error was harmless due to the overwhelming evidence of Baldwin's guilt.[1576]

[1565] 94-KA-00402-SCT, 707 So. 2d 547 (Miss. 1997); *see supra* notes 1255-64 and accompanying text for a recitation of the facts and discussion of another evidentiary issue of this case.

[1566] *De la Beckwith*, ¶¶ 139-40, 707 So. 2d at 579.

[1567] *Id.* ¶ 140, 707 So. 2d at 582.

[1568] *Id.*

[1569] *Id.*

[1570] *Id.* ¶ 142, 707 So. 2d at 582.

[1571] *Id.*

[1572] 97-KA-00475-SCT, 730 So. 2d 20 (Miss. 1998); *see supra* notes 1402-07 and accompanying text for a recitation of the facts and discussion of this case.

[1573] 97-KA-00502-SCT, 732 So. 2d 236 (Miss. 1999).

[1574] *Baldwin*, ¶¶ 2-3, 732 So. 2d at 239-40.

[1575] *Id.* ¶ 31, 732 So. 2d at 245.

[1576] *Id.* ¶ 33, 732 So. 2d at 245.

Crosswhite v. State[1577]

Snider v. State[1578]

Snider was convicted of selling less than an ounce of marijuana.[1579] A narcotics agent, when asked about serving Snider his warrant, volunteered that he served him in jail, where Snider was being held on another unrelated charge.[1580] The defense's objection was sustained, but the motion for mistrial was denied and the trial judge instructed the jury to disregard the statement.[1581] The supreme court affirmed.[1582] The inadmissible evidence implying other criminal acts by the defendant was not sought by the prosecutor, and the trial judge was in the best position to judge the effect of the instruction on the jury.[1583] Therefore, there was no error.[1584]

6. Element of the Crime Charged

In a few instances, the fact that the defendant had prior convictions is an element of the charged crime. The most obvious example of this is the crime of possession of a firearm by a felon. Similarly, proof that the defendant had been charged with some crime and was in lawful custody is necessary as part of proving the crime of escape. When other crimes or convictions are proven for this purpose, the supreme court has ruled that there was no need for a limiting instruction.[1585]

In two of the below mentioned cases, the prosecutor argued to the jury that the prior crimes showed that the defendant was the type of person who would commit those crimes and therefore probably committed the crime in the present case.

[1577] 97-KA-00148-SCT, 732 So. 2d 856 (Miss. 1999); *see supra* notes 717-24 and accompanying text for a recitation of the facts and discussion of this case.

[1578] 98-KA-00221-COA, 755 So. 2d 507 (Miss. Ct. App. 1999).

[1579] *Snider*, ¶ 2, 755 So. 2d at 509.

[1580] *Id.* ¶ 3, 755 So. 2d at 509.

[1581] *Id.* ¶¶ 4-5, 755 So. 2d at 509-10.

[1582] *Id.* ¶ 5, 755 So. 2d at 510.

[1583] *Id.*

[1584] *Id.*

[1585] *See* Henton v. State, 1998-KA-01889-SCT, ¶ 8, 752 So. 2d 406, 408 (Miss. 1999); *supra* notes 567-74 and accompanying text.

Use of this evidence of other crimes to show propensity to act is improper.

CASES:

Weaver v. State[1586]

Weaver was convicted of felony DUI, his third offense.[1587] The primary issue on appeal was whether the two prior convictions were elements of the offense and therefore admissible in the State's case-in-chief, or merely sentence enhancers, therefore admissible only in the sentencing phase.[1588] The evidence of the two priors was admitted by the trial court to prove elements of the crime and this was affirmed by the supreme court.[1589] One of the four Justices to dissent observed that in cross and closing the prosecutor referred to the prior convictions to infer his guilt of this charge, directly contrary to the policy and reasoning behind Rule 404.[1590] Here, the prior crimes were used for the "other purpose" of proving an element of the crime. It is suggested that the judge should have given a limiting instruction and prevented the prosecutor's improper drawing of the inference of guilt from that evidence.

Strickland v. State[1591]

Strickland overrules *Weaver* in dictum.[1592] The defendant, Strickland, was indicted for felony DUI, his third offense.[1593] The indictment was read to the jury without objection; therefore, the jury was aware of Strickland's prior convictions.[1594] With no error preserved on the record, Strickland on appeal argued error in allowing the State to prove the details of his past offenses.[1595] The supreme court rejected this

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[1586] 95-KA-01034-SCT, 713 So. 2d 860 (Miss. 1997).
[1587] *Weaver*, ¶ 1, 713 So. 2d at 860.
[1588] *Id.* ¶¶ 25, 29, 713 So. 2d at 864-675.
[1589] *Id.* ¶¶ 28, 32, 713 So. 2d at 865.
[1590] *Id.* ¶ 48, 713 So. 2d at 867 (Banks, J., dissenting).
[1591] 1998-KA-01706-SCT, 784 So. 2d 957 (Miss. 2001).
[1592] *See Strickland*, ¶ 20, 784 So. 2d at 962.
[1593] *Id.* ¶ 1, 784 So. 2d at 959.
[1594] *Id.* ¶ 14, 784 So. 2d at 959.
[1595] *Id.* ¶ 16, 784 So. 2d at 961.

appeal, noting that the defendant did not properly preserve his contention because he had not objected to the evidence when it was first admitted.[1596] However, in dictum, the court prospectively ruled that the prior offenses should only be used as sentencing enhancers in the sentencing phase.[1597] According to the *Strickland* court, the statute that allowed the indictment to show prior DUI's,[1598] was in conflict with Rule 404.[1599] Under the court's primacy in rule-making power, Rule 404 abrogated the statute to the extent it permits informing the jury, through reading the indictment, of the prior convictions.[1600] These are to be admitted only in the sentencing phase.[1601]

McCune v. State[1602]

McCune, who had warrants out for his arrest since 1992, was arrested and convicted of burglary and aggravated assault in 1994.[1603] He escaped from jail after being incarcerated for four days, but was eventually captured.[1604] In 1996, he escaped again and was subsequently convicted for the crime.[1605] He did not deny his escape, but claimed he was not lawfully held, in part arguing that the 1992 warrant was invalid because it was not timely served.[1606] The State was permitted to prove that he was arrested and had escaped from jail in 1994.[1607] Additionally, the State was permitted to mention that McCune had a warrant out for his arrest in 1992 for a burglary charge in addition to the assault charge.[1608] The

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[1596] *Id.*
[1597] *Id.* ¶ 17, 784 So. 2d at 961.
[1598] *See* MISS. CODE ANN. § 63-11-30(8) (1989).
[1599] *Strickland*, ¶ 18, 784 So. 2d at 961.
[1600] *Id.* ¶ 19, 784 So. 2d at 961.
[1601] *Id.*
[1602] 98-KA-00269-SCT, 736 So. 2d 378 (Miss. 1999).
[1603] *McCune*, ¶ 1, 736 So. 2d at 378.
[1604] *Id.*
[1605] *Id.* ¶ 2, 736 So. 2d at 378.
[1606] *Id.* ¶ 3, 736 So. 2d at 378-79.
[1607] *Id.*
[1608] *Id.*

burglary charge was not mentioned in this indictment.[1609] The trial court's decision was affirmed by the supreme court.[1610] The 1994 arrest and escape was relevant to counter McCune's argument that the 1992 warrants were not served for four years.[1611] The mention of the burglary charge was also relevant to the lawfulness of McCune's confinement in 1996, when he made his escape.[1612] Both of these were valid "other purposes" under Rule 404(b) and the judge polled the jury to assure that they would comply with its limiting instruction about the use of the evidence of earlier crimes.[1613]

Henton v. State[1614]

7. Conspiracy

There are not many state court opinions concerning conspiracy prosecutions. However, as the Mississippi Supreme Court observed in *Ford v. State*,[1615] the range of relevant evidence in such cases is wide.[1616] Therefore, other crimes or acts of misconduct related to the conspiracy may be shown as proof that they were included in the plan of the conspirators.

CASES:

Ford v. State[1617]

In convicting Ford of conspiracy to commit grand larceny (bank robbery), the State was allowed to prove that on the day after the bank in question was robbed, Ford and his co-conspirators committed the identical crime at another bank in West Memphis.[1618] The admissibility of this evidence was affirmed

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[1609] *Id.*

[1610] *Id.* ¶¶ 10-11, 736 So. 2d at 380-81.

[1611] *Id.* ¶ 10, 736 So. 2d at 380-81.

[1612] *Id.* ¶ 11, 736 So. 2d at 381.

[1613] *Id.* ¶ 10, 736 So. 2d at 381.

[1614] 1998-KA-01889-SCT, 752 So. 2d 406 (Miss. 2000); *see supra* notes 567-74 and accompanying text for a recitation of the facts and discussion of this case.

[1615] 546 So. 2d 686 (Miss. 1989); *see infra* notes 1617-20 and accompanying text

[1616] *Ford*, 546 So. 2d at 688.

[1617] 546 So. 2d 686 (Miss. 1989).

[1618] *Ford*, 546 So. 2d at 687-88.

on appeal, the supreme court observing that in conspiracy trials the range of relevant evidence is wide.[1619] Here, that the second robbery was committed in the same manner, was relevant to show that the conspirators acted according to a predetermined plan or agreement.[1620]

Perry v. State[1621]

In his trial for conspiracy to possess drugs and possession with intent, Perry's co-conspirator was allowed to testify that Perry had obtained marijuana in Memphis and the two of them had sold it before the events in question occurred.[1622] The admissibility of this testimony was affirmed with absolutely no comment other than that it was admissible under Rule 404(b).[1623] Presumably, this evidence was permissible to prove the ongoing conspiracy.

Harris v. State[1624]

The defendants, Harris and Magee, were both acquitted of selling crack, but were convicted of conspiracy to sell.[1625] A State's witness, a drug user, testified that the defendants sold crack in the following manner: Magee would stop the cars and make the contact, then Harris would come and make the sale.[1626] However, the witness could not remember any specific instances of such sales and could not say when they actually used this method, whether before or after the date of the conspiracy.[1627] He finally just said he knew they sold together.[1628] The trial judge instructed the jury not to consider any such evidence about sales after the events in question.[1629] The supreme court affirmed the admission of the witness's tes-

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[1619] *Id.* at 689.
[1620] *Id.* at 689-90.
[1621] 637 So. 2d 871 (Miss. 1994).
[1622] *Perry*, 637 So. 2d at 874.
[1623] *Id.*
[1624] 97-KA-00512-SCT, 731 So. 2d 1125 (Miss. 1999).
[1625] *Harris*, ¶ 1, 731 So. 2d at 1127.
[1626] *Id.* ¶ 11, 731 So. 2d at 1128.
[1627] *Id.* ¶ 12, 731 So. 2d at 1128.
[1628] *Id.*
[1629] *Id.* ¶ 13, 731 So. 2d at 1128.

timony, finding that the evidence was admissible to prove the conspiracy, thus falling within Rule 404(b).[1630]

8. Sentencing

With bifurcated sentencing trials, the range of other crimes and acts of the defendant is widest. The defendant's character, as illustrated by his past record, is admissible on the issues of aggravation or status as a habitual actor. The defendant further invites such evidence with claims of good character or past good behavior.

One limit has been noted. In *Edwards v. State*,[1631] the supreme court held that evidence of charges for which there was no conviction were not relevant in crossing a defense sentencing witness.[1632]

Haynes v. State[1633]

Haynes was convicted of assault for shooting the woman who was to be prosecutrix against him in a rape trial set to begin the day following the shooting.[1634] The trial judge allowed the State to prove a rape conviction which occurred after this assault.[1635] This was affirmed by the supreme court as relevant to the enhancement of the sentence.[1636] His prior rape conviction was relevant to his habitual status in the sentencing phase.[1637]

Hansen v. State[1638]

Hansen was convicted of murdering a patrolman and sentenced to death.[1639] In the sentencing phase, Hansen present-

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[1630] *Id.* ¶ 44, 731 So. 2d at 1132.

[1631] 97-DP-00566-SCT, 737 So. 2d 275 (Miss. 1999); *see infra* notes 1645-57 and accompanying text.

[1632] *Edwards*, ¶ 18, 737 So. 2d at 290.

[1633] 520 So. 2d 1367 (Miss. 1988); *see supra* notes 513-17 and accompanying text for a discussion of another evidentiary issue of this case.

[1634] *Haynes*, 520 So. 2d at 1367.

[1635] *Id.* at 1370.

[1636] *Id.*

[1637] *Id.*

[1638] 592 So. 2d 114 (Miss. 1991).

[1639] *Hansen*, 592 So. 2d at 120.

ed three witnesses in mitigation who testified that he had adapted well to the prison environment and would not be a threat if his life was spared.[1640] To rebut this testimonial, the State was permitted to cross those witnesses about his disciplinary record in a Florida prison which apparently showed he had not adapted well.[1641] The purpose of the cross was to show that the witnesses were not aware of his disciplinary problems in prison.[1642] This decision was affirmed by the supreme court.[1643] Hansen had raised that issue and the State was entitled to rebut and test the basis for the witness's opinions.[1644]

Edwards v. State[1645]

Edwards was convicted of murder which was committed during an armed robbery.[1646] He was sentenced to death.[1647] Edwards and his cohort shot a man and his son, robbed them and took the man's car.[1648] Here, the trial court took the unusual step of placing some restraints on the State's evidence during the sentencing phase.[1649] Edwards's mother testified for him, apparently trying to support the "deprived childhood" defense.[1650] However, she did not testify as to his good character.[1651] The prosecutor was permitted to cross-examine her about the her son's having been charged and jailed on a rape charge which was not prosecuted.[1652] The decision to allow this testimony was held to be reversible error by the supreme court.[1653] The evidence was not relevant to rebut

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[1640] *Id.* at 147.
[1641] *Id.*
[1642] *Id.*
[1643] *Id.* at 148.
[1644] *Id.*
[1645] 97-DP-00566-SCT, 737 So. 2d 275 (Miss. 1999).
[1646] *Edwards*, ¶¶ 1-3, 737 So. 2d at 284-85.
[1647] *Id.*
[1648] *Id.* ¶¶ 6-7, 737 So. 2d at 288.
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[1650] *Id.* ¶ 14, 737 So. 2d at 289.
[1651] *Id.* ¶ 17, 737 So. 2d at 290.
[1652] *Id.* ¶ 15, 737 So. 2d at 289.
[1653] *Id.* ¶ 18, 737 So. 2d at 290.

evidence of good character, nor to any aggravating factor, and was likely to have inflamed the jury.[1654] This deprived Edwards of the right to a fair trial.[1655]

Defendant also claimed error in the sentencing hearing when the prosecution was allowed to introduce evidence and to argue that Edwards had killed the victims to avoid arrest, and that he had burned the car to destroy evidence and avoid detection.[1656] These points of evidence were held to have been properly admitted, relevant to the aggravating factor of avoiding arrest.[1657]

9. Victim's State of Mind

Rarely is the state of mind of the victim of a crime relevant in a trial. The case below, *Bounds v. State*,[1658] illustrates how it can arise. In a kidnapping trial, the defendant claimed that the victim went with him willingly.[1659] It was held that his previous abuse of her was relevant on her state of mind—whether she would go with him voluntarily.[1660] The evidence, however, must show events close enough in time to be relevant to the victim's state of mind at the time of the kidnapping. How a defendant has treated a victim in the past may be relevant to show how the victim regarded the defendant at the time of the charged crime.

10. Bias or Interest of a Witness

Usually, prior crimes to prove witness bias are shown against the State's witnesses. It is argued that these witnesses are subject to the various discretionary powers and pressures of prosecutors and/or law officers unless they cooperate. These are considered evidence of bias under Rule 616.

[1654] *Id.* ¶¶ 18-19, 737 So. 2d at 290.
[1655] *Id.*
[1656] *Id.* ¶ 158, 737 So. 2d at 319.
[1657] *Id.* ¶ 159, 737 So. 3d at 319.
[1658] 688 So. 2d 1362 (Miss. 1997); *see supra* notes 469-81 and accompanying text.
[1659] *Bounds*, 688 So. 2d at 1365.
[1660] *Id.* at 1371.

In some cases, the use of the other crimes or charges against a defense witness apparently involve showing that a defense witness, because he was in similar criminal activities as the defendant, was biased for the defendant.

CASE:

Bradley v. State[1661]

In his trial on drug charges, Bradley called a witness to help him with his defense of misidentification.[1662] The witness stated that he knew Bradley and had done business with him.[1663] On cross, the State was permitted, over objections, to inquire as to whether the witness was not then under indictment and awaiting trial on similar drug charges.[1664] This admission of evidence was affirmed by the supreme court with vague reasoning that the evidence was relevant to show the witness's bias or prejudice.[1665]

[1661] 562 So. 2d 1276 (Miss. 1990).
[1662] *Bradley*, 562 So. 2d at 1280.
[1663] *Id.*
[1664] *Id.*
[1665] *Id.* at 1281-82.

COMMENTS

Revealing Mississippi Youth Court: The Consequences of Lifting Confidentiality Requirements on Juvenile Justice in Mississippi

The clatter and clang of metal shackles echoes throughout the silent courtroom as the detainee shuffles to his place at the counsel table before the judge. His status as an outcast of society is symbolized by his bright convict-yellow jumpsuit and green slippers. The deputy officer unlocks his right handcuff so he can raise his right hand enough to be sworn in. He mutters a response after the court clerk rattles off the oath, and the judge encourages him to speak up so the court reporter can write down everything he says.

The judge proceeds by explaining his rights to him and by reading the charge that has brought him there. The charge could be as minor as taking a bike from a neighbor or as serious as breaking and entering to steal firearms, or worse. The prosecutor interrogates him about his degree of involvement in the incident, whether it was gang or perhaps drug-related. His supervision officer reports on how many drug screens he has failed and how many times he has been suspended from school. The victim coordinator explains the amount of restitution the victim has requested. The detainee's mother expresses her exasperation with him, how he never does what he's told, never behaves, and frequently acts out at home with violent anger, but how he's a good kid, really.

He may swell up with tears, sometimes genuine, sometimes manufactured, but when the prosecutor starts talking

about going away to the training school that very day, even the mother who asked for it is having regrets. Of course the detainee promises to do better, to start going to church and to quit smoking dope. He swears he'd be clean if he took a drug screen today.

The judge ponders all of these statements as he decides to send the child to the training school for an indefinite period of time, depending on his behavior at the school, which could last until he is twenty years old. And for a thirteen-year old, seven years is an eternity.

Welcome to Youth Court.[1]

I. INTRODUCTION

Several scholars of America's juvenile justice system have criticized the system for its constitutional shortcomings,[2] including the inherent constitutional flaws of confidential proceedings.[3] Removing the shackles of confidentiality, in addi-

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[1] *See* M.A. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 15-20 (1982) (evaluating juvenile justice system in context of personal observations of juvenile court). My own internship in Desoto County, Mississippi allowed me to observe the inner workings of the youth court system. Youth court confidentiality restrictions are lifted for those with a direct interest in the youth court proceeding or those persons conducting educational research who agree not to disclose the identities of youths observed in youth court. MISS. CODE ANN. §§ 43-21-203(6), -261(1) (2000 & Supp. 2001); *see also* Hon. Gordon A. Martin, Jr., *Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings*, 21 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 393, 395–96 (1995) (delineating exceptions to juvenile delinquency confidentiality statutes of several jurisdictions).

[2] *See* Martin, *supra* note 1, at 397-400 (expressing need for open juvenile delinquency proceedings to restore public's faith in juvenile justice system); Robert E. Shepherd, Jr., *The "Child" Grows Up: The Juvenile Justice System Enters Its Second Century*, 33 FAM L.Q. 589, 590-93 (1999) (presenting overview of evolution of juvenile justice system) [hereinafter Sheperd I]; Robert E. Shepherd, Jr., *The Juvenile Court at 100: Birthday Cake or Funeral Pyre?*, CRIM. JUST., Winter 1999, at 47, 49-50 (explaining origins of juvenile justice system in contrast with modern system) [hereinafer Shepherd II]; Stephan E. Oestreicher, Jr., Note, *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 54 VAND. L. REV. 1751, 1771-1801 (2001) (proposing new Fourteenth Amendment argument against closed juvenile proceedings).

[3] Martin, *supra* note 1, at 394-95; Oestreicher, *supra* note 2, at 1752-71. In the 1990s, many states broadened public access to juvenile records. Oestreicher,

tion to resolving constitutional troubles, could lead to a more effective juvenile justice system. By easing restraints on internal communication, revealing juvenile proceedings to the public would facilitate the quickest and most efficient processing of youth court cases.[4] Open juvenile court proceedings and

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supra note 2, at 1753. *See generally* JOHN C. WATKINS, JR., THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS (1998) (presenting exhaustive development of juvenile justice system since inception); Judge Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 57-58 (1992) (calling into question original goals of juvenile justice system). Currently, Mississippi is one of nineteen jurisdictions that presumptively close juvenile proceedings and allow disclosure of juvenile records only in certain circumstances. Oestreicher, *supra* note 2, at 1755-56; *see* MISS. CODE ANN. § 43-21-203(6) (2000); *see also* ALA. CODE § 12-15-65(a) (1995 & Supp. 2002); ALASKA STAT. § 47.10.070(a) (Michie 2000); CONN. GEN. STAT. ANN. § 54-76(h) (West 2001); D.C. CODE ANN. § 16-2316(e) (2001); IDAHO CODE § 16-1608(b) (Michie 1979 & Supp. 2000); KY. REV. STAT. ANN. § 610.070(3) (Michie 1999); MASS. GEN. LAWS ANN. ch. 119, § 65 (West 1993 & Supp. 2002); N.H. REV. STAT. ANN. § 169-B:34 (1994 & Supp. 2001); N.J. STAT. ANN. § 2A:4A-60(I) (West 1987 & West Supp. 2002); N.Y. JUD. CT. ACTS § 341.1 (McKinney 1999); OHIO REV. CODE ANN. § 2151.35(A) (West Supp. 2001); R.I. GEN. LAWS § 14-1-30 (2000); S.C. CODE ANN. § 20-7-755 (Law. Co-op. 1985 & Supp. 2001); TENN. CODE ANN. § 37-1-124(d) (2001); VT. STAT. ANN. tit. 33, § 5523(c) (2001); W. VA. CODE ANN. § 49-5-2(i) (Michie 2001); WIS. STAT. ANN. § 48.299(1)(a) (West 1997 & Supp. 2001); WYO. STAT. ANN. § 14-6-224 (Michie 2001).

[4] Martin, *supra* note 1, at 406-09. Closed juvenile delinquency proceedings and confidential juvenile records present significant constitutional conflicts. *Id.* In fact, confidentiality of juvenile proceedings is not a constitutional right, although the importance of confidentiality in youth court proceedings is understood to be a vital part of the rehabilitative goals of the system. *Id.* at 397-98. Primarily, the Sixth Amendment right to confrontation and the First Amendment freedom of the press clash with the confidentiality requirements of the juvenile justice system. *Id.* at 398-400; *see also* Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (upholding publication of name of juvenile murder suspect obtained from lawful interviews with law enforcement and witnesses); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 308-09 (1977) (allowing publication of information disclosed in public juvenile proceeding); Davis v. Alaska, 415 U.S. 308, 319 (1974) (upholding Sixth Amendment right of confrontation over juvenile confidentiality in case concerning juvenile record of key identification witness).

Accordingly, confidential juvenile records inhibit the ability of youth services agencies to carry out court orders and to aid the rehabilitation of the child. *See* Hon. Aaron Ment, 97 Op. Att'y Gen. Ct. 014 (1997) (addressing interagency communication exemption to Connecticut juvenile confidentiality statutes). However, most states, including Mississippi, alleviate this problem by allowing youth services agencies access to juvenile records for interagency processing. MISS. CODE ANN. § 43-21-261(1)(d) (2000 & Supp. 2001).

public access to juvenile delinquency records also serve as an important tool in maintaining the state's interest in public safety; however, the ultimate public safety and well-being of the state may best be served by keeping juvenile delinquency proceedings and records confidential, giving juveniles a second chance to become productive members of society without the smear of a criminal record.[5]

Confidentiality has been an important defining aspect of the juvenile justice system.[6] In many situations, states must weigh the interest in public safety against the best interest of the child to decide under which circumstances to remove confidentiality.[7] Perhaps the steps taken to remove confidentiality when necessary have already cured any dangers that confidentiality may pose to the juvenile court system, the adult criminal justice system, and the interest in public safety.[8]

This comment will address the practical consequences of opening youth court proceedings to the public. It will begin by explaining the origins of the juvenile justice system and the original purpose behind juvenile justice confidentiality. This comment will continue with a summary of Mississippi's youth court confidentiality statutes and statutory exceptions, followed by an exposition of the consequences that public youth court proceedings may have on Mississippi youth and Mississippians as a whole. The confidentiality of juvenile delinquency proceedings is the only confidentiality at issue in this comment. By no means should the confidentiality of neglected or abused children be disturbed. Likewise, this comment will not address issues concerning the prosecution of juveniles as adult offenders.

II. CONFIDENTIALITY AND THE HISTORY OF JUVENILE COURT

Confidentiality of juvenile court proceedings historically has been one of most critical aspects of the juvenile justice

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[5] Interview with Judge Mills Barbee, County Court Judge of Desoto County, Miss. in Hernando, MS (Oct. 15, 2001).

[6] *See infra* note 9.

[7] *See supra* note 3.

[8] *See infra* notes 19-20 and accompanying text.

system.[9] From the creation of the first formal juvenile court in Chicago, Illinois in 1899,[10] confidentiality has been regarded as a necessary catalyst for the successful rehabilitation of wayward youth.[11] The purpose of keeping juvenile proceedings behind closed doors was to minimize the criminal stigma that could follow a youth throughout out his life, thus impeding his transformation into a well-adjusted, productive mem-

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[9] Oestreicher, *supra* note 2, at 1767-68; *see also* NAT'L ADVISORY COMMITTEE ON CRIM. JUST. STANDARDS & GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION 773-77 (1976) (presenting juvenile justice concerns of twenty-five years ago); Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of the Children*, 33 NEW ENG. L. REV. 39, 40-44 (1998) (proposing modern solutions for juvenile delinquency prevention in context of overview of juvenile justice history and comparative evaluation of statutory law); Kenneth A. Schatz, *Juvenile Justice: Reflections on 100 Years of Juvenile Court*, 1998 VT. B.J. & L. DIG. 50, 50-51 (recounting ideal goals of original juvenile justice system); Shepherd I, *supra* note 2, at 589.

[10] Schatz, *supra* note 9, at 50.

[11] *Id.* at 50-51 (quoting description of "state's compelling interest in confidential juvenile proceedings" expressed in *In re J.S.*, 438 A.2d 1125, 1129 (Vt. 1981)). The Vermont Supreme Court suggested that the stigma created by publication of the juvenile's conduct might become "self-perpetuating," and the youth would subsequently never overcome the stigma attached to conduct which he could have "outgrown," were his conduct never publicly known. *J.S.*, 438 A.2d at 1129. However, United States Supreme Court case law has evidenced only a "tenuous link" between closed juvenile delinquency proceedings and the rehabilitation goals of the juvenile justice system. Oestreicher, *supra* note 2, at 1768 n.89. The informal proceedings of youth court, including confidentiality requirements, "may actually decrease the odds of effectively rehabilitating a delinquent." *Id. See generally* Kent v. United States, 383 U.S. 541 (1966) (upholding due process rights of juvenile, including attorney access to juvenile records to determine adequacy of investigation).

Several opinions of the Supreme Court provide a general overview of the Court's juvenile justice jurisprudence. *See* Schall v. Martin, 467 U.S. 253, 281 (1984) (upholding soundness of preventative detention statute as advancing state's interest in juvenile welfare); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 106 (1979); Okla. Publ'g Co. v. Dist. Court, 480 U.S. 308, 308-09 (1977); Breed v. Jones, 421 U.S. 519, 525-26 (1975) (recognizing double jeopardy effect of juvenile adjudication proceeding); McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (denying juvenile's right to jury trial, citing high probability for disruption which would most likely outweigh any benefit of jury presence); *In re* Winship, 397 U.S. 358, 364 (1970) (holding proof "beyond a reasonable doubt" standard applicable to juvenile proceedings); *In re* Gault, 387 U.S. 1, 12 (1967) (recognizing that juveniles have basic constitutional rights of due process, confrontation of witnesses and protection against self-incrimination); *Kent*, 383 U.S. at 541.

ber of society.[12]

The primary goal of the juvenile justice system, according to its founders, was not to punish, but rather to "protect, rehabilitate, and heal"[13] the youth, using the court system to promote the best interests of the child, a concept known as *parens patriae*.[14] The aim of the original juvenile justice court was to encourage the youth into rehabilitation with the caring involvement of the judge and community working together, calling for the judge to "put his arm around [the juvenile's] shoulder" and effectively escort the juvenile back into society.[15]

Throughout the years since the inception of the juvenile court, states have enacted statutes that shift the focus of the juvenile justice system from a rehabilitative model to a more punitive and retributive one.[16] The original means for achiev-

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[12] Schatz, *supra* note 9, at 50-51; *J.S.*, 438 A.2d at 1129; *see* Shepherd I, *supra* note 2, at 589. *See generally* JUSTICE POLICY INSTITUTE AND CHILDREN AND FAMILY JUSTICE CENTER, THE CHILDREN'S COURT CENTENNIAL COMMUNICATIONS PROJECT, SECOND CHANCES: GIVING KIDS A CHANCE TO MAKE BETTER CHOICES (2001) (following success stories of adjudicated juvenile delinquents who used their juvenile justice experiences to turn their lives around, included are current politicians and judges).

[13] Schatz, *supra* note 9, at 50-52.

[14] *Id.* *Parens patriae* literally means "father of the country," reflecting the philosophy that the court should "act as a kind and just parent." *Id.*; *see also* NAT'L COUNCIL ON CRIME & DELINQ., GUIDES FOR JUVENILE COURT JUDGES 1-3 (1963) (explaining juvenile justice system's primary goal of rehabilitation and offering special factors for youth court judges to consider); HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT 86 (1999) (reporting comprehensive details of history of juvenile justice system and current juvenile offender statistics, including rationalization of *parens patriae* concept); Conward, *supra* note 9, at 42-44 (explaining *parens patriae* philosophy's emphasis on best interests of child).

[15] Shepherd II, *supra* note 2, at 48 (quoting Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909)); *see also* FRANCIS BARRY MCCARTHY & JAMES G. CARR, JUVENILE LAW AND ITS PROCESSES 57-63 (1989) (presenting attitudes concerning the original goals of juvenile justice system); Conward, *supra* note 9, at 42-44. Courts recognize that juveniles do not have the same mental capacity as adults and often act before thinking about the consequences of their actions, and likewise do not necessarily possess the premeditated intent to commit crimes. *Id.*; Barbee interview, *supra* note 5; *see generally* State v. Mary Doherty, 2 Tenn. (2 Overt.) 79 (1806) (addressing lack of capacity of twelve or thirteen year-old to commit murder); *see also* MCCARTHY & CARR, *supra*, at 5-7 (providing background information on Mary Doherty case and notes on related concepts).

[16] Shepherd II, *supra* note 2, at 47. *See generally* VICTOR STREIB, DEATH PEN-

ing rehabilitation is no longer the most effective method of bringing about justice in the juvenile justice system of this century.[17] Accordingly, our juvenile justice system must evolve to meet the modern needs of juveniles and of society today.[18] What is the next step in rehabilitating the juvenile justice system itself?

III. MISSISSIPPI YOUTH COURT CONFIDENTIALITY LAW

Mississippi is currently one of twenty-one states that do not open juvenile court proceedings to the public and maintain confidentiality of juvenile court records.[19] However, youth court proceedings and records are not absolutely sealed; necessary court staff and interested persons, including those necessary in carrying out the judge's ordered disposition of the delinquent child, have access to the child's files in order to help him through his disposition.[20] However, when a child is

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ALTY FOR JUVENILES (1987) (recounting history of severe punishment inflicted on children prior to foundation of juvenile court in 1899).

[17] *See* PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1967-97 UPDATE (1998); Conward, *supra*, note 9 at 40-45; Martin, *supra* note 1, at 393; Oestreicher, *supra* note 2, at 1752-55.

[18] *See* TORBET & SZYMANSKI, *supra* note 17; Conward, *supra* note 9, at 40-45; Martin, *supra* note 1, at 393; Oestreicher, *supra* note 2, at 1752-55.

[19] TORBET & SZYMANSKI, *supra* note 17, at 10 tbl. 5 (reporting juvenile law statute statistics); MISS. CODE ANN. § 43-21-261 (2000 & Supp. 2001). "Records" include court records, MISS. CODE ANN. § 43-21-251 (2000), law enforcement records, MISS. CODE ANN. § 43-21-255 (2000), and agency records, MISS. CODE ANN. § 43-21-257 (2000). Court records include intake records, medical examinations, mental health examinations, and all youth court proceedings and evidence. MISS. CODE ANN. § 43-21-251 (2000). Law enforcement records are comprised of documents and reports made by law enforcement in the process of conducting apprehension and detention, including fingerprinting and photographing. MISS. CODE ANN. § 43-21-255 (2000). Juveniles adjudicated delinquent for what would be adult felonies or offenses involving dangerous weapons are subject to having fingerprints and photographs reported to a local repository for identification, but the fingerprints and photographs are not necessarily available for public inspection. *Id.* Records of juveniles twice adjudicated delinquent of a sex offense or convicted as an adult of a sex offense are made available to the public and are not confidential. MISS. CODE ANN. § 43-21-255(5) (2000). Agency records include those maintained by the Department of Human Services and Division of Youth Services. MISS. CODE ANN. § 43-21-257 (2000).

[20] MISS. CODE ANN. § 43-21-261 (2000); MISS. CODE ANN. § 43-21-203(6)

adjudicated delinquent for certain crimes, his name and address are not confidential and may be released to the public.[21] Likewise, when a juvenile violates certain Mississippi criminal statutes he is automatically tried as an adult and subject to open public proceedings.[22] Sixth and Fourteenth Amendment jurisprudence has been used to attack the constitutionality of waiver statutes that automatically send a youth to trial in adult court, under which the juvenile's constitutional right to speedy and public trial by jury and fundamental due process rights may be jeopardized.[23]

IV. CONSEQUENCES OF PUBLIC YOUTH COURT DELINQUENCY PROCEEDINGS

Several scholars contend that adolescents cannot be held to the same standards of accountability for their wrongdoing as adults.[24] Indeed, some scientific research indicates that an

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(2000); SNYDER & SICKMUND, *supra* note 14, at 101 (presenting overview of states' confidentiality law statistics).

[21] MISS. CODE ANN. § 43-21-261 (8), (9) (2000). In some situations a list of the names of adjudicated juvenile delinquents may be forwarded to local law enforcement, in the interest of public safety. MISS. CODE ANN. § 43-21-261 (2), (3) (2000); Barbee interview, *supra* note 5. Until 1999, Mississippi youth courts were required to publish the names of repeat offenders and their parents in the local newspaper. MISS. CODE ANN. § 43-23-17 (1993) (repealed 1999); Conward, *supra* note 9, at 60; Martin, *supra* note 1, at 404.

[22] MISS. CODE ANN. § 43-21-261 (8), (9) (2000 & Supp. 2001). Juveniles adjudicated delinquent of crimes that would be felonies if they were tried as adults are not confidential and may be made available to the public. *Id.* Juveniles adjudicated delinquent of murder, manslaughter, burglary, arson, armed robbery, aggravated assault and any sex offense shall be made available to the public. *Id.* In Mississippi the judge has the discretion to adjudicate the case in youth court or transfer it to the adult court under the purview of the circuit court, also known as discretionary judicial waiver. SNYDER & SICKMUND, *supra* note 14, at 102.

[23] Martin, *supra* note 1, at 398-401; Oestreicher, *supra* note 2, at 1781-87.

[24] *See* Stephen J. Morse, *Delinquency and Desert*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 56, 56 (1999) (advocating need for special considerations of adolescent mentality before deciding culpability); Lisette Blumhardt, Comment, *In the Best Interests of the Child: Juvenile Justice or Adult Retribution?*, 23 U. HAW. L. REV. 341, 351-54 (2000) (proposing alternative disposition of juvenile justice matters primarily because of mental infancy of juveniles and inability to form adult intent); *See also* State v. Mary Doherty, 2 Tenn. (2 Overt.) 79 (1806) (addressing capacity of twelve or thirteen year old girl to commit murder). *But see* MCCARTHY & CARR, *supra* note 15, at 5; *see also supra* note 5 and accompanying text.

adolescent's brain has not fully developed and simply cannot appreciate the difference between right and wrong.[25] Therefore, children simply cannot be held to the same criminal standard as adults, nor should they be held as accountable to society for their wrongdoing.[26] Confidentiality of youth court proceedings preserves a child's accountability to the public by concealing the delinquency proceedings from the public eye.[27] Accordingly, the stigma of being legally labeled a "delinquent child" is mitigated because of the shield of confidentiality.[28]

The social stigma of being a "delinquent child" may be the only immediate consequence if youth court proceedings were opened to the public. The serious long-term effects of making a juvenile record available to the public, however, may hinder the youth's ability to obtain gainful employment in the future or attend the college of his choice, even long after the youth has been completely rehabilitated.[29]

On the other hand, the significant deterrent value of stigma is easily overlooked. Peer pressure and desire to fit in is felt the strongest throughout adolescence at school, and a

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[25] Blumhardt, *supra* note 24, at 353.

[26] Morse, *supra* note 24, at 57-58; Blumhardt, *supra* note 24, at 353.

[27] *See supra* note 11 and accompanying text.

[28] *Id.*

[29] Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part 1*, CRIM. JUST., Summer 2000, at 59, 59-61 (expounding on various aspects of life affected by juvenile delinquency adjudication, including more severe sentencing for future adult crimes, inability to possess a firearm upon adulthood, public access to HIV and DNA tests, and requirements to register with local law enforcement as a sex offender); Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, CRIM. JUST., Fall 2000, at 41, 41-43 (explaining consequences and effect on lives of juvenile delinquents through expanded media exposure of juvenile delinquency proceedings, immigration status, future service in the military, use of juvenile records for impeachment purposes, future employment, and admission into institutions of higher learning); *see also* Martin, *supra* note 1, at 402-04. In 1995, nineteen-year-old, straight-A student Gina Grant's early admission to Harvard University was revoked after the school anonymously received newspaper clippings revealing details of the Gina's voluntary manslaughter of her abusive, alcoholic mother when Gina was only fourteen years old. *Id.*; *see also* Jon Auerbach, *S.C. Judge Backs Teen-Ager: Says She Was Abuse Victim, Should Be Given Fresh Start*, BOSTON GLOBE, Apr. 8, 1995, at 12, *available at* 1995 WL 5933091; Fox Butterfield, *Woman Who Killed Mother Denied Harvard Admission*, N.Y. TIMES, Apr. 8, 1995, at 1, 12.

symbolic public display of the child's behavior creates the desire to conform to societal norms.[30] School-age children, from the first grade through high school, respond most effectively to disciplinary techniques that involve a public (though simple) illustration of their wrongdoing (e.g., receiving demerits displayed on a bulletin board or having their "card" pulled, etc.).[31] Other students see that another student has misbehaved and a high-school heckler's veto, of sorts, works to discourage anti-social behavior.[32]

However, such publicity could also encourage fame-seekers who revel in the glorification that media coverage of their misconduct would bestow upon them.[33] Needless to say, the acts that resulted in the tragedies in Pearl, Mississippi, Jonesboro, Arkansas and at Columbine High School need no more encouragement.

Opening youth court proceedings to the public would also increase society's awareness of the juvenile justice system, allowing society to check the power of individual judges, thereby restoring faith in our youth court system.[34] Public knowledge of youth court proceedings would also scare youths into avoiding becoming a part of the system.[35] Public awareness could deter would-be delinquent children from evolving into adult offenders, which, in turn, would lessen the adult criminal population by curtailing the problem from its onset.[36] Studies show that drug rehabilitation programs cost significantly less than detention programs alone, and, considering

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[30] Interview with parochial high school teacher, urban public school third-grade teacher, suburban public school first-grade teacher and county public school resource teacher in Desoto County, Miss. and Shelby County, Tenn. (Oct. 16, 2001).

[31] *Id.*

[32] *Id.*

[33] Martin, *supra* note 1, at 402; Schatz, *supra* note 5, at 50-51.

[34] Martin, *supra* note 1, at 394-95; *cf.* Conward, *supra* note 9 at 46-48. Isolated violent juvenile crimes are vastly over-sensationalized by the media, and violent juvenile crime rate statistics are artificially inflated by newspapers and television. Conward, *supra* note 9, at 46-48. "Extremely violent juvenile offenders constitute a small proportion, less than ten percent, of this nation's criminal young." *Id.* at 48.

[35] Barbee interview, *supra* note 5.

[36] *Id.*

the significant role in crime that drugs play, rehabilitating young habitual drug users before they turn into career criminals could prove much more profitable than continuing to pour tax dollars into building jails to house adult offenders.[37]

CONCLUSION

Although confidentiality requirements pose procedural speedbumps in the disposition of adjudicated juvenile delinquents, current confidentiality statutes provide the protection of confidentiality for those who require it. Accordingly, when public safety is a pressing concern, most statutes permit revealing the identity of juvenile delinquents to the public. Therefore, the protection of confidentiality remains intact for those juveniles who would benefit most from it and are most likely to become rehabilitated. Likewise, the concern for public safety is advanced by letting courts reveal to the public the identities of the more serious juvenile delinquents. As time progresses and the juvenile justice system evolves, at least some sort of confidentiality should be available to protect those whose adult lives should not be haunted by juvenile mistakes.

Melissa C. Walker

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[37] Blumhardt, *supra* note 24, at 358-60. For example, Florida spends $2,000 to rehabilitate a drug offender through a drug treatment program, but would spend $17,000 to imprison him. *Id.* Drug rehabilitation also reduces the likelihood that the former drug user will commit future crimes. *Id.*; *see also* Jeffrey Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy*, 183 PLI/CRIM. 395, 398 (1999) (reporting results from studies evidencing more severe punishment for juveniles tried in adult courts resulting in adverse affect on juvenile rehabilitation and increase in recidivism).

A Settlement of *Ayers v. Musgrove*: Is Mississippi Moving Towards Desegregation in Higher Education or Merely a Separate but 'More Equal' System?

I. INTRODUCTION

For over twenty-five years the case of *Ayers v. Fordice* has been in the court system.[1] Originally filed in 1975, plaintiff Jake Ayers alleged that the State of Mississippi and the Board of Trustees of State Institutions of Higher Learning (the Board) continued to maintain a racially segregated system of higher education.[2] Finally, in 1992, the Supreme Court ruled on the case and set up a new legal standard for determining if a state has met its obligation to eradicate its prior *de jure* segregated system of higher education.[3] The decision included a remedial decree for the district court to consider on remand but did not give much guidance as to how Mississippi should dismantle the remnants of past *de jure* segregation.[4]

The parties, courts and Legislature of Mississippi have considered many solutions, and now in 2002, the parties have agreed to a settlement.[5] It remains to be seen, however,

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[1] United States v. Fordice, 505 U.S. 717, 723 (1992). Originally filed under the name *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), it is now styled *Ayers v. Musgrove*.

[2] *Fordice*, 505 U.S. at 723; *see* Lorne Feinberg, Note, United States v. Fordice *and the Desegregation of Public Higher Education: Groping for Root and Branch*, 34 B.C. L. REV. 803, 821 (1993). Private plaintiffs included a district court certified class of "all black citizens residing in Mississippi, whether students, former students, parents, employees or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity and/or equal employment opportunity in the universities operated by said Board of Trustees." *Allain*, 674 F. Supp. at 1526.

[3] Feinberg, *supra* note 2, at 828.

> If the state perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.

Fordice, 505 U.S. at 731.

[4] *Fordice*, 505 U.S. at 733-43.

[5] *See* Ayers Settlement Approved by District Court, *at* www.ihl.state.ms.us

whether the settlement will in fact desegregate the higher education system or will merely further a "separate but more equal" system.[6] Attorney and Dean of Thurgood Marshall School of Law at Texas Southern University, John Brittain, thinks, ""The key now is equity, not integration. Maybe blacks should flip around and argue that "separate but equal" is justified to ensure victims of discrimination access. Maybe it's time to modify what *Brown* means.""[7]

This comment will focus on whether, in dismantling the prior *de jure* system, Mississippi should focus on a completely integrated system or should take another look at *Brown* and instead focus on making the historically black universities equal to their historically white counterparts.

II. THE IMPLICATIONS OF *BROWN V. BOARD OF EDUCATION*

The Supreme Court in *Brown v. Board of Education*[8] declared that "in the field of public education the doctrine of 'separate but equal' has no place."[9] *Fordice* states that Mississippi has the constitutional duty to dismantle the dual school system implemented by *de jure* segregation and that this obligation definitely extends to higher education.[10] *Brown* mandates that if a state has not dismantled its segregated school system, it is in violation of the Fourteenth Amendment.[11] The Court also clearly stated that to continue a separate but more equal system does not meet *Brown*'s burden to take affirmative steps to remove the prior *de jure* system. For this reason, the Court rejected an order to upgrade Jackson State Univer-

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(last visited Feb. 28, 2002) [hereinafter Settlement Agreement]. The settlement terms consist of $500 million to the historically black universities over the next seventeen years. *Id.*

[6] The *Fordice* Court indicates that separate but more equal facilities are not constitutional under *Brown*. *Fordice*, 505 U.S. 717, 743.

[7] Douglas McCollam, A Separate Peace, AM. LAW., Jan. 2000, at 73.

[8] 347 U.S. 483 (1954).

[9] *Brown*, 347 U.S. at 495. The Supreme Court held that separate schools were inherently unequal and that requiring children to attend segregated facilities denied them equal protection of the law under the Fourteenth Amendment. *Id.* at 495.

[10] *Fordice*, 505 U.S. at 727.

[11] *Id.*

sity, Alcorn State University and Misssissippi Valley State University solely that they may be financed as exclusively black schools by private choice.

A. *The Effect of* Brown *on Mississippi*

After the landmark decision of *Brown* was announced in 1954, not much happened to integrate higher education in Mississippi.[12] In fact, even the *Brown II* mandate of "all deliberate speed" in Mississippi meant no speed at all.[13] It was not until 1962, by court order, that Mississippi admitted its first black student, James Meredith, to the University of Mississippi.[14] The Board of Trustees adopted several new admissions requirements including a minimum score on the American College Testing Program (ACT) test and that applicants have at least five letters of recommendation written on their behalf by alumni of the school to which they applied.[15]

In 1969, the United States Department of Health, Education and Welfare (HEW) asked the state to submit a plan within 120 days to dismantle the formerly *de jure* segregated

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[12] A study of higher education in Mississippi, authorized by the Board, produced the Brewton Report. The report recognized the disproportionate educational opportunities for whites and blacks within the state. Robert N. Davis, *The Quest for Equal Education in Mississippi: The Implications of* United States v. Fordice, 62 MISS. L.J. 405, 411 (1993).

[13] Brown v. Board of Ed., 349 U.S. 294, 301 (1955). Members of the Board, officials of the University of Mississippi, various state officials, including the Governor and Lieutenant Governor and the Legislature all made great efforts to keep the University of Mississippi from being integrated. Ayers v. Allain, 674 F. Supp. 1523, 1529 (N.D. Miss. 1987). The Legislature went so far as to pass constitutional provisions requiring segregation in public schools. MISS. CONST. art. VIII, § 207 (1956) (repealed 1977); *see* MISS. CODE ANN. § 17-10-4065.3 (1956) (repealed 1970) (requiring, in 1956, that all persons responsible to executive branch of government prohibit any integration of black and white races, including within schools).

[14] *Fordice*, 505 U.S. at 722. Meredith's application was denied, originally on the basis of overcrowded conditions. Fienberg, *supra* note 2, at 820. After Meredith's admittance, Mississippi State first admitted a black student in 1965, Mississippi University for Women and Delta State in 1966 and University of Southern Mississippi in 1967. *Allain*, 674 F. Supp. at 1529.

[15] Feinberg, *supra* note 2, at 821. The Fifth Circuit Court of Appeals struck down the alumni voucher requirement as unconstitutional and remanded the case to determine if there were valid reasons for denying Meredith's admission. Meredith v. Fair, 298 F.2d 696, 701-03 (5th Cir. 1962).

university system.[16] Five years later, the Board submitted a plan of compliance laying out the general goals of improving educational opportunities for all of the state's residents.[17] The HEW rejected the plan because it did not go far enough to comply with Title VI.[18] The Board made amendments to the plan, which HEW rejected, but the Board nevertheless adopted the plan.[19] Despite the Board's limited efforts, the state legislature refused to fund the plan until 1978 and then at less than half the amount requested by the Board.[20]

III. THE *FORDICE* DECISION

A. Historical Look at Ayers *in the Courts*

In 1975, private petitioners filed suit alleging that Mississippi had violated the Fifth, Ninth, Thirteenth and Fourteenth Amendments and Title VI of the Civil Rights Act by maintaining the effects of its prior *de jure* segregated higher education system.[21] Three months later the United States intervened as a party plaintiff.[22] For twelve years after the filing of the lawsuit, the parties tried to work out their differences by a "voluntary dismantlement" of the dual system.[23] In 1981, the

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[16] Feinberg *supra* note 2, at 821. These efforts were meant to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and to improve educational opportunities for minorities in higher education. *See* Fordice, 505 U.S. at 722; Davis, *supra* note 12, at 413.

[17] *Fordice*, 505 U.S. at 722. The plan set out goals for enrollment of other-race students at state universities employment of other-race faculty; the means of doing this included remedial programs and special recruitment efforts. *Id.*

[18] *Id.* at 723.

[19] *Id. Ayers* was filed not long after the HEW rejected the Board's plan. Feinberg, *supra* note 2, at 821.

[20] *Fordice*, 505 U.S. at 723.

[21] *Id.*

[22] Feinberg, *supra* note 2, at 822. Plaintiffs alleged that defendants had maintained the segregated system through admissions practices and through mission statements that continued to maintain inequality between historically white institutions (HWUs) and historically black institutions (HBUs). *Id.*

[23] *Fordice*, 505 U.S. at 724. In this time period, the Board approved different ACT requirements, with those for the HWUs being higher than those for the HBUs. Their intent was to provide blacks with greater access to college but plaintiffs point to the policy as state-sponsored segregation. Cory Todd Wilson, Note, *Mississippi Learning: Curriculum for the Post-Brown Era of Higher Education Desegregation*, 104 YALE L.J. 243, 249 (1994).

Board of Trustees issued "mission statements," describing the purpose of each university.[24] In 1987, because the parties could not reach an agreement as to whether or not the State had taken adequate measures to dismantle the prior *de jure* system, they went to trial.[25] The district court found for the State.[26] The Fifth Circuit Court of Appeals affirmed the district court's decision.[27] The Supreme Court remanded the case in 1992.[28]

B. Influential Cases

Throughout the litigation of *Ayers*, the parties and the judges relied upon several prior desegregation cases.[29] How-

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[24] *Fordice*, 505 U.S. at 724. There were three categories of universities: comprehensive universities—those with the greatest resources and program offerings; urban universities—schools at which the degree and research programs were narrower and geared toward the city environment; and regional universities—schools serving mainly in an undergraduate role. *Id.* The comprehensive universities included the University of Mississippi, Mississippi State University and the University of Southern Mississippi—all historically white universities. *Id.* Jackson State was the only urban university and Delta State University, Misssissippi University for Women, Alcorn State University and Mississippi Valley State University were the schools deemed to be regional universities. *Id.*

[25] *Id.* at 725.

[26] Ayers v. Allain, 674 F. Supp. 1523, 1564 (N.D. Miss. 1987). Judge Biggers focused on current actions of the State and racially neutral policies implemented in good faith. *Allain*, 674 F. Supp. at 1554.

[27] Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990) (en banc). The en banc majority stated that the State's duty to dismantle the prior *de jure* system was discharged through Mississippi's implementation of race-neutral policies which give students a choice in higher education. *Allain II*, 914 F.2d at 678.

[28] *Fordice*, 505 U.S. at 743. The Court found that the State had not met its affirmative duty to dismantle the prior *de jure* system and was therefore in violation of the Constitution and Title VI. *Id.*

[29] *See* Green v. Sch. Bd., 391 U.S. 430 (1968) (mandating elimination of *de facto* segregation in lower education); Ala. State Teacher's Ass'n v. Ala. Pub. Sch. & Coll. Authority, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969) (concluding that state has satisfied its burden if it has implemented race neutral, equal-access policies for all colleges, distinguishing higher education from *Green*). *But see* Bd. of Visitors of the Coll. of William & Mary v. Norris, 404 U.S. 907 (1971), *aff'g* Norris v. State Council for Higher Educ., 327 F. Supp. 1368 (E.D. Va. 1971) (extending *Green* to higher education and requiring more than just neutral policies for Virginia to meet its burden to desegregate schools). *Cf.* Bazemore v. Friday, 478 U.S. 385, 408 (1986) (distinguishing between duty to desegregate organizations of voluntary attendance and duty to desegregate mandatory organi-

ever, *Green v. School Board of New Kent County*[30] and *Bazemore v. Friday*[31] were the cases most relied upon.[32] In *Green*, the Court stressed the importance of dismantling the prior dual school system by establishing a unitary one and the necessity of measuring the county's freedom of choice plan.[33] The Court also emphasized that *Brown II* mandated that school boards must take affirmative steps to change to a unitary system where "racial discrimination would be eliminated root and branch."[34] Such a mandate placed the duty on the local school board to achieve desegregation.[35]

In *Bazemore* the Court distinguished between a voluntary club and compulsory public school education.[36] The Supreme Court found that there was no violation of the Fourteenth Amendment because the service no longer had a discriminatory admission policy, and the mere existence of single-race clubs did not create a constitutional violation.[37] *Green* did not

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zations).

[30] 391 U.S. 430 (1968).

[31] 478 U.S. 385 (1986).

[32] The court of appeals relied upon *Bazemore* to justify the conclusion that the State had dismantled its former *de jure* system because universities are fundamentally different from lower level schools. *Fordice*, 505 U.S. at 728.

[33] Mary Ann Connell, *The Road to* United States v. Fordice*: What is the Duty of Public Colleges and Universities in Former De Jure States to Desegregate?*, 62 MISS. L.J. 285, 317-18 (1993). After the Civil Rights Act of 1964 threatened to stop funding school districts that operated segregated schools, the New Kent County School District implemented a freedom of choice plan, allowing students to choose which schools to attend. *Id.* No white students chose to go to the all-black school and only 15% of black students chose to attend the all-white school. *Id.*

[34] *Green*, 391 U.S. at 437-38. The Court did not say all freedom of choice plans would not work, but this one did not and in the future the Court would look at the effectiveness of the plan in desegregating the school system, not the promise. Connell, *supra* note 32, at 318.

[35] Connell, *supra* note 32, at 318. Green's mandate went beyond previous rulings of the Court. *Id.*

[36] *Id.* at 329. The North Carolina Extension Service discontinued its segregated 4-H and Homemakers Club policy following the Civil Rights Act of 1964. *Bazemore*, 478 U.S. at 409 (White, J., concurring). However, many clubs remained all-white or all-black. Connell, *supra* note 32, at 329. On appeal, the pertinent question became: "May North Carolina satisfy its obligation to desegregate the *de jure* system of 4-H Clubs and Extension Homemakers Clubs by adopting a freedom of choice plan that fails?" *Bazemore*, 478 U.S.at 393 n.4 (Brennan, J., concuring).

[37] *Bazemore*, 478 U.S. at 408 (White, J., concurring).

apply to the voluntary association in *Bazemore*.[38]

In *Allain*, the lower courts found the university system to be sufficiently different in character from the lower schools.[39] In addition, the court of appeals felt students had a real freedom to choose which school they would attend.[40] Therefore, the State had satisfied its burden to dismantle its prior *de jure* system by adopting race neutral policies in the higher education system.[41] The Supreme Court disagreed with the standard applied by the lower courts.[42]

C. Fordice*'s New Standard*

In its decision, the Supreme Court established a new standard to determine whether the State has met the obligation to dismantle its prior *de jure* segregated university system.[43] It was the Court's opinion that "a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation."[44] Continuing policies and practices, the Court went on to say, which originated from the prior dual system that continue to have segregative effects and do not have "sound educational justification," violate the Equal Protection Clause.[45]

The Court pointed out four suspect remnants of the prior *de jure* system.[46] The Court first addressed the admissions policies of the universities and found that they were enacted with a discriminatory purpose and also had current discrimi-

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[38] *Id.* (White, J., concurring).

[39] Ayers v. Allain, 914 F.2d 676, 686 (5th Cir. 1990).

[40] United States v. Fordice, 505 U.S. 717, 728 (1992).

[41] *Allain*, 914 F.2d at 686.

[42] *Fordice*, 505 U.S. at 728-29. Just because attendance is by choice does not mean race neutral admission policies are sufficient to remedy the constitutional violation of the dual system. *Id.* at 729. There are many factors besides admissions policies that lead to student attendance in a choice-based system. *Id.*

[43] *Id.* at 731.

[44] *Id.* at 728.

[45] *Id.* at 731. It is irrelevant that the State abolished the laws requiring separation of the races. *Id.*

[46] *Id.* at 733. The Court clarified that the four are not exclusive and that the court of appeals should examine other policies as well. *Id.*

natory effects.[47] The unnecessary duplication of programs at Historically Black Universities (HBUs) and Historically White Universities (HWUs) was the second area of concern for the Supreme Court.[48] The policy of "separate but equal" resulted in the duplication of programs; continuing such duplication, the Court reasoned, perpetuated the illegal policy.[49] Next, the Court considered Mississippi's institutional mission classifications and whether they perpetuated a dual education system.[50] The Court found the mission classifications were traceable to policies enacted to continue segregation and that the classifications also limited student choice.[51] Finally, the Court recognized that the existence of eight public universities was traceable to the dual system.[52] The Court remanded the issue of whether maintaining eight universities affects student choice and perpetuates a segregated system.[53]

D. Implications of the Fordice *Decision*

While originally seen as a victory for the plaintiffs, the Supreme Court decision has serious implications for historically black colleges and for a settlement between the parties. The Supreme Court clearly stated that the HBUs should not be maintained

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[47] *Fordice*, 505 U.S. at 734. When the ACT requirement of fifteen was implemented in 1963, the average score for a white student was eighteen, and the average score for a black person was seven. *Id.* The admissions standards present in 1992 required at least a score of fifteen to automatically qualify for admission to one of the five HWUs and a score of thirteen for the HBUs. In 1985 only 30% of Mississippi black high school seniors made a fifteen, while 72% of white students did. *Id.* at 734-35.

[48] *Id.* at 738. The lower court wrongly imposed the burden of proof on the plaintiff. *Id. Brown* established that the State has the burden to prove it has dismantled the prior *de jure* system. *Id.* at 739.

[49] *Id.* at 738.

[50] *Id.* at 739.

[51] *Id.* at 741. The Court remanded the question of "whether it would be practicable and consistent with sound educational practices to eliminate any such discriminatory effects of the State's present policy of mission assignments." *Id.*

[52] *Fordice*, 505 U.S. at 741.

[53] *Id.* at 742. The Court also questioned whether keeping all eight universities is educationally justifiable and whether one or more could be closed or merged with another university. *Id.*

> solely so that they may be publicly financed, exclusively black enclaves by private choice . . . . The State provides these facilities for *all* its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior *de jure* system when it perpetuates a separate, but "more equal" one.[54]

However, Justice Thomas points out in his concurrence that "[i]t would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."[55] Alvin Chambliss has even gone so far as to say, "Integration is fine, but this case is really about an opportunity for black kids to get an education."[56]

IV. THE *AYERS* SETTLEMENT

Although there have been many settlement proposals over the past several years, both parties have finally signed off on one that the Mississippi Legislature has agreed to fund and U.S. District Judge Neal Biggers has approved.[57] The proposed settlement consists of $503 million to be paid to the HBUs over the next seventeen years.[58] This amount includes $245 million to go towards academic programs, $75 million for capital improvements, $55 million in public endowment funds, $35 million in private endowment funds and the over $83 million already spent as part of the *Ayers* remedy.[59] The agreement

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[54] *Id.* at 743. The question of whether an increase in funding is needed to fully dismantle the dual system was left for the lower court to consider on remand. *Id.*

[55] *Id.* at 749 (Thomas, J., concurring).

[56] McCollam, *supra* note 7, at 73. Alvin Chambliss did represent the plaintiffs class but later became the attorney for a separate group of plaintiffs—including Lillie Ayers, widow of Jake Ayers—opposed to the settlement. *Id.*

[57] Andy Kanengiser, *Biggers Signs Ayers Accord*, CLARION-LEDGER (Jackson, Miss.), Feb. 16, 2002, at 1A, *available at* 2002 WL 7714636.

[58] Patrice Sawyer, *Ayers: It's Over, Senate Vote Seals Deal in College Suit*, CLARION-LEDGER (Jackson, Miss.), Jan. 19, 2002, at 1A, *available at* 2002 WL 7613853.

[59] *Id.* The public endowment will be created over the next fourteen years by the legislature appropriating $5 million every year for eleven years out of interest

stipulates that $500,000 will be paid annually for the fiscal years of 2002-2006, and $750,000 will be paid for the following five years to increase financial aid for summer remedial programs.[60] The settlement also includes the requirement that the HBUs attract ten percent other-race enrollment by the Fall of 2018 and sustain it for three years to share in the principal of the private and public endowment funds.[61] Currently, Jackson State and Mississippi Valley State each have a five percent other-race enrollment, and Alcorn State has an eight percent other-race enrollment.[62] Jackson State's share in the endowment will be 43.4% and Alcorn State and Mississippi Valley State will each get 28.3%.[63]

Since the *Fordice* decision, new degree programs have also been added to the historically black institutions in hopes of attracting white students.[64] The proposed settlement also adds many new programs and benefits for each of the historically

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accrued on the Working Cash-Stabilization Reserve Fund. Settlement Agreement, *supra* note 5, at 15-16. For the last three years, $15 million will be appropriated out of the Ayers Endowment Trust which exists in the Working Cash Fund. *Id.* at 16; *see* Miss. Code Ann. § 37-101-27 (2000):

> Fifteen million dollars ($15,000,000) in the Working Cash-Stabilization Reserve Fund shall be set aside and placed in the Ayers Endowment Trust. . . .
>
> The interest and income earned . . . shall be appropriated by the Legislature to the Board of Trustees of State Institutions of Higher Learning for the benefit of Jackson State University, Alcorn State University and Mississippi Valley State University . . . . The money allotted for each university shall be used for continuing educational enhancement and racial diversity, including recruitment of white students and scholarships for white applicants.

Id.

[60] Settlement Agreement, *supra* note 5, at 15.

[61] *Id.* at 10-11. If an HBU does not raise other-race enrollment to ten percent by 2018, the income from the endowment will continue to be given to the institution so long as the Board determines the university is making a good faith effort to reach the ten percent goal. *Id.* at 11.

[62] Andy Kanengiser, *$503.2M Outlined in Ayers Proposal*, CLARION-LEDGER (Jackson, Miss.), April 3, 2001, at 1A.

[63] Settlement Agreement, *supra* note 5, at 9-10.

[64] Andy Kanengiser, *Parties Seek 10% Solution*, CLARION-LEDGER (Jackson, Miss.), March 20, 2001, at 1A. Some of these programs include doctorates in business administration, urban planning, social work and public health at Jackson State. *See* Kanengiser, *supra* note 63.

black institutions.[65] If the settlement is approved, Jackson State will receive a new engineering building costing $20 million, $3.3 million to buy the former Allstate building to transform into an e-commerce center and small business incubator, and Mississippi Veterans Memorial Stadium will be officially designated the Jackson State football stadium.[66] In addition, as part of the settlement, Jackson State may submit to the College Board a request to gain a doctoral program in international studies.[67]

For Alcorn State's main campus, the remedy includes a $10.5 million biotechnology building, a repair project costing $3.5 million for Dumas Hall to aid in the goal of gaining accreditation for its business program and $1 million to improve security and access.[68] Benefits for Alcorn's Natchez campus include $1.1 million to go towards equipment to better the master's program in business administration and $9 million to create a fine arts center.[69] Mississippi Valley State will receive $5 million for its library, $16.7 million for a science and technology building costing and nearly $5 million to improve landscaping and drainage and for building repairs and renovations.[70]

Furthermore, Jackson State's designation will change from an "urban" university to a "comprehensive" university, the same label given to the three largest historically white universities.[71] However, this description does not imply any change to the school's mission statement.[72] It is not clear if this

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[65] Settlement Agreement, *supra* note 5, at 5. The funding agreed to in the settlement is not adequate to immediately implement all of the programs listed, but implementation and enhancement of the programs should occur in the next seventeen years. *Id.* at 5. See *id.* at 6 for a list of programs at each HBU.

[66] *See* Kanengiser, *supra* note 63. The agreement states that the Legislature should enact legislation to facilitate the changes. Settlement Agreement, *supra* note 5, at 18.

[67] Settlement Agreement, *supra* note 5, at 9.

[68] *Id.* at 13.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 17-18; *see supra* note 24 and accompanying text.

[72] Settlement Agreement, *supra* note 5, at 18. The settlement expressly states that mission designations are not addressed by the agreement. *Id.*

change in designation will actually change future funding.

The settlement agreement is much less than the $1 billion originally asked for by the plaintiffs.[73] It also does not include an open admissions policy or a new law school at Jackson State, both of which requests were earlier denied by Judge Biggers.[74] Lillie Ayers, the widow of Jake Ayers, and some faculty members believe the settlement is insufficient. They disagree with the 10% other-race enrollment requirement and, as a result, filed a motion through attorney Alvin Chambliss to opt out of the plaintiffs class.[75] Ideally, the degree programs and the other-race enrollment requirement will help to desegregate the universities and not just make them more equal.

However, Louisiana, a state with the same *de jure* segregation problem, engaged in a consent decree with plaintiffs in 1984 for $60 million to be paid out over ten years.[76] Their settlement also established new degree programs at historically black institutions and sought to deal with the problem of program duplication.[77] Unfortunately, this settlement has done little to desegregate higher education in Louisiana; in fact, there is evidence that it has actually pulled blacks out of the historically white universities in favor of the upgraded historically black universities.[78]

To some people, including the *Ayers* plaintiffs, such a result may not be troublesome.[79] The plaintiffs' goal may in fact have never been to desegregate the higher education system but instead to receive equal funding at the HBUs—an understandable objective.[80] After all, Alvin Chambliss said, "'People talk about integration; integration is just a means to an end. It really doesn't mean anything by itself. It doesn't mean *any-*

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[73] Andy Kanengiser & Grace Simmons Fisher, *Plaintiff: Ayers Plan OK*, CLARION-LEDGER (Jackson, Miss.), Apr. 4, 2001, at 1A.

[74] *Id.*

[75] *Id.* This request was denied by the district court and dismissed by the Fifth Circuit on appeal. *See supra* note 55.

[76] Scott B. Arceneaux, Comment, *Chasing the Dream: Higher Education Desegregation in Louisiana*, 69 TUL. L. REV. 1281, 1305 (1995).

[77] *Id.*

[78] McCollam, *supra* note 7, at 72.

[79] *See supra* note 54 and accompanying text.

[80] *See* McCollam, *supra* note 7, and accompanying text.

thing!'"[81] However, integration does mean something to the Supreme Court and ignoring the mandate of both *Brown* and now *Fordice* is undoubtedly a violation of the Constitution.[82]

V. An Evaluation of the Settlement

The previous inability of the parties to reach a settlement and the politics involved in any legislative remedies are keeping the universities in Mississippi from becoming better quality institutions of higher learning. While the plaintiffs' focus seems to have become equality, which is important, the State and especially Judge Biggers have tried to hold on to the mandate of *Fordice* of dismantling the prior *de jure* system.

Does the settlement satisfy this mandate of *Fordice*? Because of the minimal direction given by the Supreme Court, it's hard to tell whether, if the case went back before the Court, it would find the terms satisfactory. However, it is possible to evaluate how the settlement addresses the four suspect remnants of *de jure* segregation the Court pointed out.

A. Admissions Policies

Despite plaintiffs' efforts, the settlement does not include a significant change in current admissions standards. Since *Fordice*, however, admissions standards have been changed.[83] Students with a high school GPA of 3.2 in college preparatory classes will automatically qualify for admission to any state institution of higher learning.[84] Students with a 2.5 GPA or

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[81] *See id.*; *supra* note 54.

[82] *See supra* notes 40, 52 and accompanying text.

[83] *See supra* note 45 and accompanying text.

[84] Admissions requirements can be found at the following web sites (last visited Feb. 16, 2002): University of Mississippi, http://www.olemiss.edu/admissions/policies/freshman.html; Alcorn State University, http://www.alcorn.edu/admissions/admissio.htm; Mississippi State University, http://www.msstate.edu/dept/admissions/domestic/require.htm; Mississippi University for Women, http://www.muw.edu/admissions/requirements.html; Mississippi Valley State University, http://www.mvsu.edu/Admsn/procedure.html; Jackson State University, http://www.jsums.edu/undergraduateadmissions.htm; Delta State University, http://www.deltast.edu/admissions/index.html; University of Southern Mississippi, http://www.admissions.usm.edu/html/admin_req.shtml.

those who rank in the top 50% of their class and obtain at least a sixteen on the ACT will also be admitted to these universities.[85] Students with a 2.0 GPA need a score of eighteen on the ACT to be automatically admitted to these same institutions.[86]

The uniformity of the universities' admissions requirements indicates that the requirements are no longer connected to the prior *de jure* system. In addition, high school grades are now considered along with ACT scores. The Supreme Court felt such a change would "increase the number of black students eligible for automatic admission to all of Mississippi's public universities."[87] However, it is still arguable that even a minimum score requirement of sixteen on the ACT limits the choice of students who are in the top 50% of their class but do not have a 3.2 GPA.

B. Unnecessarily Duplicated Programs

The settlement sets up many new programs at the HBUs but does not take away any at HWUs or HBUs. The parties might try to argue a sound educational justification for this issue; however, the Supreme Court found no educational justification for 90% of the graduate programs and 34.6% of the undergraduate programs at HBUs to be duplicated at HWUs.[88] Furthermore, at all the schools that were originally designated by the Legislature to train "black teachers for black schools" or

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[85] *See supra* note 85. SAT scores will also be accepted in place of ACT scores. The minimum score on the SAT needed in conjunction with a 2.5 GPA varies slightly at the different universities: University of Mississippi—760, Alcorn State University—650, Mississippi State University—760, Mississippi University for Women—760, Delta State University—650, Mississippi Valley State University—750. *Id.* Specific SAT scores are not listed for Jackson State University and the University of Southern Mississippi.

[86] *See supra* note 85. As with the 2.5 GPA, SAT scores may be substituted for ACT scores. The minimum SAT score needed in conjunction with a 2.0 GPA varies slightly at the different universities: University of Mississippi—860, Alcorn State University—740, Mississippi State University—860, Mississippi University for Women—850, Delta State University—740, Mississippi Valley State University—840. *Id.* Specific SAT scores were not listed for Jackson State University and the University of Southern Mississippi.

[87] United States v. Fordice, 505 U.S. 717, 737 (1992).

[88] *Fordice*, 505 U.S. at 738-39.

"white teachers for white schools,"[89] duplicative teaching programs and other programs originally established to separate the races in schools remain. In fact, part of the settlement includes a $20 million engineering building for Jackson State, while Mississippi State already has an established engineering program. While it is promising to have so many new programs approved for funding at the HBUs, in order to both comply with *Fordice* and to best allocate resources, some graduate and non-core undergraduate programs should be closed at some schools, forcing students wanting to participate in that program to attend whichever HBU or HWU that happens to have the program.

C. Mission Classifications

The settlement reclassifies Jackson State as a comprehensive university but does not change the mission statement or promise the same amount of money as historically given to the three largest state universities. Whether this satisfies *Fordice* may depend on whether, in the future, Jackson State receives the same funding as the University of Mississippi, Mississippi State and the University of Southern Mississippi. However, even if Jackson State does receive equal funding it is just one of the three HBUs.

D. Existence of Eight Universities

The settlement neither merges nor closes any of the eight universities. While the Court did not say one or more universities must be closed, it did require the inquiry of whether the retention of all eight universities affects student choice and continues a segregated system, whether maintaining all eight is educationally justifiable and whether one or more could be practicably merged or closed. Obviously, having eight universi-

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[89] *See* MISS. CODE ANN. § 24-6-6809 (1942) (creating Jackson State University, known then as Mississippi Negro Training School, in 1940 with object to "qualify negro teachers for the negro public schools of this state"); 1946 Miss. Laws 327 (establishing Mississippi Valley State University as "the Mississippi vocational college to train negro teachers for rural and elementary negro schools").

ties does affect students' choice in that they have eight universities to choose from. However, where some of the universities are distinctly HBUs and some are clearly HWUs, having so many to choose from, combined with the duplicated programs, undoubtedly perpetuates a segregated system, in that many whites will choose to attend a HWU while many blacks will choose a HBU. In addition, it is not educationally justifiable to maintain all eight universities. The refusal to come to a consensus on merging or closing at least one of the eight universities only furthers the crippling status quo Mississippi seems so comfortable with. In a relatively poor state like Mississippi, it is not economically practical to divide the scarce resources among so many schools. By closing or merging one or more of the universities, additional money would be available, and by combining this with cutting down on duplicative programs, the programs that are offered at particular universities could be enhanced. The *Fordice* Court also specified that the upgrade of the HBUs may not be done so that the HBUs become publicly financed, solely black institutions. Specifically, a separate but "more equal" system does not satisfy *Brown*. While the HBUs are receiving a substantial amount of money to upgrade their facilities and programs, the settlement does attach a 10% other-race requirement. However, even this seems minimal. A school that is 90% black and 10% other-race still appears segregated. Unfortunately, as long as all eight schools are maintained, short of forcing students to attend schools not historically associated with their race, there is little that can be done to guarantee they will become fully desegregated.

Missisippi has tried in some ways to comply with the new standard and to answer what the Supreme Court mandated. The 10% requirement and the establishment of new programs at HBUs satisfies the requirement of dismantling by doing more than just making the universities more equal. The State has also streamlined admissions requirements. However, there are still problems with duplication. While the state did look at merging institutions, nothing has been done about the effectiveness of eight universities in one of the poorest states in the country.

VI. CONCLUSION

Is integration the route to equality, or is equality the route to integration? This is a question we may never know the answer to, but the Supreme Court seems to think desegregation is of foremost importance. In addition, past efforts of equalizing institutions seem to indicate that more money does not necessarily make a historically black institution more attractive to white students. Unfortunately, we may never see segregation completely eradicated in the higher education system of Mississippi. With a lawsuit in the court system for so long, the parties understandably wanted it settled. However, by entering into a consent decree, the focus of the parties' litigation became contractual issues rather than Constitutional issues. The increase in funding, together with the growth of the other-race enrollment requirement and expansion of course offerings at historically black universities is at least a step in the right direction. Perhaps by finally ending the twenty-seven year-old lawsuit, Mississippi will be able to move on and focus on improving education for all of its citizens.

Molly L. Mitchell

RECENT DECISION

Constitutional Law—Fifth Amendment—Takings Clause—Mandatory IOLTA Program Constitutes Per Se Taking

I. FACTS

In 1988, the Texas Supreme Court created a mandatory program requiring Texas attorneys to place certain funds held on behalf of their clients within Interest on Lawyers Trust Accounts (IOLTA), for the purpose of funding legal aid organizations with the interest accruing from the accounts.[1] Pursuant to the program, funds that are minimal in amount or temporarily held must be deposited in an interest bearing IOLTA account at a financial institution.[2] Accrued interest

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[1] Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 183 (5th Cir. 2001). IOLTA programs became popular after a 1980 change in federal law that allowed lawyers to set up interest bearing demand accounts, which allow for immediate withdrawal, with client funds. *Wash. Legal*, 270 F.3d at 182-83. From 1984 to 1988, the Texas IOLTA program was voluntary, generating an approximate annual revenue of $1 million. *Id.* at 183. Recent accounting of the interest generated from the mandatory program totals over $5 million annually. *Id.* at 184.

[2] *Id.* at 183. Whether an amount is minimal or temporarily held is determined by the attorney after weighing the potential accrual against the maintenance cost of the account. *Id.* at 183-84. Thus, if the attorney determines that the client could not earn a net gain on the accruing interest, the funds should be deposited in an IOLTA account. *Id.* Obviously, any given attorney's calculations could be the subject of dispute. *Id.* at 184 n.2. The parties agreed that an attorney could combine the funds of numerous clients within one single account in attempting to achieve a net gain. *Wash. Legal*, 270 F.3d at 184 n.2.

from the IOLTA accounts is forwarded to the Texas Equal Access to Justice Foundation (TEAJF), a nonprofit corporation created by the Texas Supreme Court, for distribution to organizations that provide legal services to indigent persons.[3] Washington Legal Foundation filed a lawsuit against the TEAJF and the Texas Supreme Court in the United States District Court for the Western District of Texas claiming that the IOLTA program violated the Fifth Amendment of the United States Constitution by taking client property without compensation.[4]

Initially, the issue of whether interest earned on IOLTA accounts constituted private property for purposes of the Fifth Amendment was appealed to the United States Supreme Court.[5] On remand, the district court conducted a bench trial and found that the Texas IOLTA program did not violate the Fifth Amendment of the United States Constitution.[6] The

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[3] *Id.* at 183. The TEAJF possesses the authority to distribute the IOLTA funds to any organization that offers indigent legal aid as its principal purpose. *Id.* Certain activities can disqualify legal aid organizations from receiving IOLTA funds, such as financing class action suits or political lobbying. *Id.*

[4] *Id.* at 184. Michael Mazzone, an attorney, and William Summers, a citizen who owned principal funds being held in an IOLTA account, were also plaintiffs. *Id.* The plaintiffs also claimed that the Texas IOLTA program violated the First Amendment because it required them to finance speech that they considered offensive. *Id.* The plaintiffs named the TEAJF, the TEAJF's chairman and the justices of the Texas Supreme Court as defendants. *Id.* In addition to reimbursement of the accrued interest, the plaintiffs sought equitable relief, specifically an order declaring all mandatory IOLTA regulations invalid. *Wash. Legal*, 270 F.3d at 184, 189.

[5] *Id.* at 185. Entering judgment for the defendants, the district court initially held that the clients possessed no property rights in the accrued interest from the IOLTA accounts. *Id.* Reversing in part, the Fifth Circuit Court of Appeals characterized the IOLTA interest as a property right, yet affirmed the part of the district court's ruling that denied reimbursement relief on Eleventh Amendment immunity grounds. *Id.* Affirming the Fifth Circuit, the Supreme Court's decision was extremely narrow, holding only that the accrued interest from an IOLTA account belonged to the client as a property right for purposes of a Fifth Amendment takings analysis. *Id.*

[6] *Wash. Legal*, 270 F.3d at 185. The district court relied heavily on the proposition that no "identifiable compensable loss" exists for the client because a net gain cannot be derived from the interest accruing to an IOLTA account. *Id.* Applying the ad hoc balancing analysis, which weighs the nature and degree of the governmental regulation along with public benefit considerations, the district court decided that no Fifth Amendment taking had occurred. *Id.* In addition to denying

plaintiffs appealed, and the United States Court of Appeals for the Fifth Circuit held: reversed and remanded.[7] When states appropriate the accrued interest from mandatory IOLTA accounts as a device to fund legal aid organizations, they commit a per se taking in violation of the Fifth Amendment.[8]

II. RELATED LAW

The Fifth Amendment of the United States Constitution prohibits the government from taking private property for public use without justly compensating the owner.[9] Over the

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the First Amendment claim, the district court also removed the justices of the Texas Supreme Court as defendants on the grounds of legislative immunity. *Id.*

[7] *Id.* at 182. The case was decided before a three judge panel of the Fifth Circuit, and one dissenting opinion was filed. *Id.* at 182, 195. Finding a violation of the Fifth Amendment, the Fifth Circuit declined to rule on the plaintiffs' First Amendment claim. *Id.* at 182. The case was remanded to the district court for entry of declaratory and injunctive relief. *Id.* at 195.

[8] *Id.* at 182, 188. The Fifth Circuit, rejecting the district court's ad hoc analysis, found that the intrusive nature of the IOLTA program required the application of the per se takings rule, which categorically demands compensation despite significant public benefit considerations. *Id.* at 186-89. After determining that a taking had occurred, the Fifth Circuit undertook an exhaustive analysis of case law to justify the appropriateness of declaratory and injunctive relief. *Id.* at 190-94. On a minor note, the Fifth Circuit rejected the Texas Supreme Court's claim of legislative immunity from equitable relief, primarily basing its decision on a concession by the court. *Id.* at 194. However, the Fifth Circuit further noted that while legislative immunity from equitable relief may encompass the adoption of rules, it does not cover subsequent enforcement. *Wash. Legal*, 270 F.3d at 194-95.

[9] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The Fifth Amendment applies to the states through the Fourteenth Amendment. First English Evangelical Lutheran Church v. Los Angeles County, Cal., 482 U.S. 304, 310 (1987). While historically envisaged to ensure compensation when the government used its eminent domain powers to appropriate real property, the scope of Fifth Amendment protection was broadened in the early twentieth century. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (establishing that overburdensome regulation upon private property rights will be recognized as unconstitutional taking); *see also* William Hadley Littlewood, Comment, *Transferable Development Rights, TRPA, and Takings: The Role of TDRs in the Constitutional Takings Analysis*, 30 MCGEORGE L. REV. 201, 205 (1998) (noting that *Mahon* "changed the general notion that the Takings Clause only protected private landowners against direct appropriations"). *But see Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting) (noting that Fifth Amendment protections do not apply when government "merely prevents the owner from making a use which interferes with paramount rights of the public"). Recent scholarship suggests that the Supreme Court's modern takings jurisprudence represents

past century the Supreme Court has faced many challenges in attempting to apply takings law to different types of property burdened by varying degrees of government intrusion.[10] This section examines the jurisprudence which led the Fifth Circuit Court of Appeals to apply the per se takings rule to a governmental program that forces contribution from privately held financial accounts.[11]

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a significant strengthening of private property rights. Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 624 (1996) (asserting that current Supreme Court has rendered "the Takings Clause a formidable tool against liberal economic policy"). In 2001, takings law became a popular subject both in the media and general public because of the highly publicized case of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). *See generally* Eric Pianin, *Landowners Given New Rights on Environmental Curbs*, WASH. POST, June 29, 2001, at A18, *available at* 2001 WL 23177380 (noting that *Palazzolo* decision will expand opportunities for developers to sue public agencies who frustrate their construction plans); David G. Savage, *The Supreme Court Justices Strengthen Property Owners' Rights to Challenge Blocked Plans for Development Law*, L.A. TIMES, June 29, 2001, at A26, *available at* 2001 WL 2499535 (suggesting that *Palazzolo* decision represents triumph for landowners in their ongoing battle with state and local regulatory agencies). One of the significant issues flowing from the *Palazzolo* decision asks whether an unconstitutional taking is effected when the landowner suffers only a partial loss in value as compared to the property's economic potential as a whole. *See* Brittany Adams, Note, *From* Lucas *to* Palazzolo*: A Case Study of Title Limitations*, 16 J. LAND USE & ENVTL. L. 225, 262-63 (2001) (analyzing whether property can suffer severe regulation and still retain value). This type of ultra-specific issue represents the complexity of the modern takings analysis. *See* Charles R. Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch: Will Takings Impact Analysis Enhance or Damage the Federal Government's Ability to Regulate?*, 44 ADMIN. L. REV. 403, 416-17 (1992) (reviewing numerous conditions that must be present before takings case can even undergo judicial review).

[10] *See* Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695, 698 (2000) (suggesting that Supreme Court's preference for factual balancing tests to resolve takings disputes offers little guidance to lower courts and reveals inherent difficulty in distinguishing different kinds of property regulation). In 1992, Justice Scalia outlined the different categorical approaches that the Court had created over the years, particularly the balancing analysis and the per se rule. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-16 (1992).

[11] For an exhaustive analysis of how state IOLTA programs first came under Fifth Amendment fire, see Terence E. Doherty, *The Constitutionality of IOLTA Accounts*, 19 WHITTIER L. REV. 487, 489-506 (1998).

A. The Ad Hoc Balancing Test

In *Penn Central Transportation Co. v. New York City*,[12] the Supreme Court created a factual balancing test to apply in regulatory takings cases.[13] In *Penn Central*, a commercial landowner in Manhattan claimed that a city agency had unconstitutionally taken its property by refusing to allow expansion above Grand Central Terminal.[14] After balancing the character and impact of the expansion refusal against the landowner's investment-backed expectations, the Court held that no Fifth Amendment protections had been violated.[15]

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[12] 438 U.S. 104 (1978).

[13] *Penn Cent.*, 438 U.S. at 124. While prior decisions had also utilized balancing techniques to decide takings cases, the *Penn Central* Court clearly identified specific factors that should be considered when private property suffers governmental regulation. *Id.* at 124.

[14] *Id.* at 119. Penn Central Transportation Company had contracted with a foreign company to construct and manage a multi-story office building above the existing Grand Central Terminal. *Id.* at 116. A city commission denied the appropriate building permits due to Grand Central Terminal's protected status under New York preservation law. *Id.* at 117.

[15] *Id.* at 124, 138. Three factors define the *Penn Central* Court's ad hoc balancing test: the economic impact of the governmental act, its effect on investment-backed expectations and the character or nature of the governmental act. *Id.* at 124. Precedent in support of the criteria can be found throughout property-related jurisprudence, even dating back to the nineteenth century. *See* Lawton v. Steele, 152 U.S. 133, 137 (1894) (asserting that public interest, regulatory purpose and hardship upon property owner must be considered when scrutinizing property regulation). The modern Court has consistently applied the ad hoc balancing test to regulatory takings scenarios. Bowen v. Gilliard, 483 U.S. 587, 606 (1987); *see also* Hodel v. Irving, 481 U.S. 704, 714 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986). *See generally* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 496 (2001) (stating that recent jurisprudence assigns increased weight to investment-backed expectation factor). Other decisions have added teeth to the balancing inquiry when the government imposes an exaction in return for granting development permits. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (establishing that "rough proportionality" must exist between exaction and impact of development); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (establishing that "nexus" must exist between state's beneficial policy and imposed exaction).

Two of the circuits have officially adopted the *Penn Central* inquiry as the appropriate analysis for state IOLTA programs. Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 855 (9th Cir. 2001) (en banc); Wash. Legal

The Court reasoned that governmental action which promotes public policy will not always constitute a taking simply because it incidentally affects certain property rights.[16]

B. Unconstitutionality of Forced Contributions

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[17] the Supreme Court scrutinized the public appropriation of accrued interest on a financial account whose principal belonged to a private party.[18] In *Webb's*, the Seminole County, Florida Cir-

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Found. v. Mass. Bar Found., 993 F.2d 962, 974 (1st Cir. 1993). While the Supreme Court has not chosen the appropriate takings analysis for IOLTA scrutiny, Justice Souter implicitly favored the ad hoc balancing test. Phillips v. Wash. Legal Found., 524 U.S. 156, 176 (1998) (Souter, J., dissenting). In *Legal Foundation*, the Ninth Circuit stated that the IOLTA program presents "the very circumstances for which the *Penn Central* analysis was intended." *Legal Found.*, 271 F.3d at 855. Likewise in *Massachusetts Bar*, the First Circuit invoked the ad hoc balancing test, rejecting use of the per se rule. *Mass. Bar*, 993 F.2d at 975 ("We find no logical analogy between the physical invasion of real property . . . and the operation of the IOLTA Rule."). *But see Legal Found.*, 271 F.3d at 864-67 (Kozinsky, J., dissenting) (choosing per se rule for IOLTA analysis). The dissent in *Legal Foundation* vigorously opposed the majority's choice of the ad hoc balancing test as the proper avenue for an IOLTA inquiry, stating that "it is not true that a court is free to choose whether it prefers the ad hoc approach or the per se approach in taking cases. Rather, the two approaches reflect different solutions to different problems." *Id.* at 865. The dissent explained that the majority attempted to bypass the per se rule by identifying it only with real property, yet "[f]or purposes of the takings clause . . . real and personal property are reduced to their cash equivalents." *Id.* at 866. Analogizing, the dissent suggested that it made no difference whether the government enters your house and takes a painting or enters and takes cash. *Id.* (Kozinsky, J., dissenting).

[16] *Penn Cent.*, 438 U.S. at 124. Justice Brennan asserted that a compensable taking doubtfully occurs "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* However, the Court noted that the public benefit of a property restriction must always be demonstrated by the relevant governmental authority. *Id.* at 127; *see* Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 514 (1977) (Stevens, J., concurring) (contending that governmental regulation of property must promote societal welfare to avoid constitutional violation); Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590, 595 (1962) (analyzing whether land use restriction truly operates as safety measure); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) ("The governmental power to interfere by zoning regulations with the general rights of the land owner . . . cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."); Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (same).

[17] 449 U.S. 155 (1980).

[18] *Webb's*, 449 U.S. at 155-56. Interestingly, Justice Blackmun pointed out that

cuit Court, pursuant to statute, retained the interest accruing on an interpleader fund deposited in its registry.[19] The Court held that the appropriation constituted a forced contribution to public revenue and thus violated the Takings Clause of the Fifth Amendment.[20] The Court reasoned that the intrusive conversion of the interest on a financial account unconstitutionally takes private property in the same manner as a physical invasion upon real property.[21]

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the Court granted certiorari because several state court decisions had already declared the appropriation of accrued interest on interpleader funds unconstitutional. *Id.* at 159; *see* Sellers v. Harris County, 483 S.W.2d 242, 243 (Tex. 1972) (asserting that private funds deposited in county registry "are not owned by the county but are only held in trust for the litigant who establishes his right thereto").

[19] *Webb's*, 449 U.S. at 157. The Florida statute clearly authorized the appropriation of accrued interest on funds deposited in the Seminole County Circuit Court. FLA. STAT. ANN. § 28.33 (West 1999). Immediately after purchasing Webb's Fabulous Pharmacies' assets, Eckerd's of College Park discovered that the company's debts constituted more than the purchase price. *Webb's*, 449 U.S. at 156. Eckerd's protected itself from the company's creditors by filing an interpleader complaint in the Seminole County Circuit Court and depositing the purchase price into the court's registry. *Id.* at 156-57. Subsequently, the court appointed a receiver to handle the distribution of Webb's Fabulous Pharmacies' assets. *Id.* at 157. The court clerk delivered the interpleader fund to the receiver, less a statutory maintenance fee and over $100,000 in accrued interest. *Id.* at 158.

[20] *Webb's*, 449 U.S. at 163. The Court disagreed with the Florida Supreme Court's departure from the general rule concerning deposited funds that interest always follows the principal. *Id.* at 162-63. The Florida Supreme Court stated that "the statute takes only what it creates." Beckwith v. Webb's Fabulous Pharmacies, Inc., 374 So. 2d 951, 953 (Fla. 1979), *rev'd*, 449 U.S. 155 (1980). The Court dismissed this assertion, stating that the government cannot arbitrarily recharacterize the fund as public money simply because it sits in the court's registry. *Webb's*, 449 U.S. at 164; *see also* Kevin H. Douglas, Note, *IOLTAs Unmasked: Legal Aid Programs' Funding Results in Taking of Clients' Property*, 50 VAND. L. REV. 1297, 1311-12 (1997) (reiterating that government's recharacterization of funds violated both Fifth Amendment and general rule that interest follows principal). The Court stated that the governmental conversion of the interest "by *ipse dixit* . . . is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent." *Webb's*, 449 U.S. at 164.

[21] *Webb's*, 449 U.S. at 163-64. The Court asserted that the appropriation of accrued interest on a financial account parallels the physical appropriation of real property. *Id.*; *see* J. David Breemer, Comment, *IOLTA in the New Millennium: Slowly Sinking Under the Weight of the Takings Clause*, 23 U. HAW. L. REV. 221, 239 (2000) (contending that *Webb's* "directly establishes a physical occupation takings rule for accrued interest income"). To justify its analogy, the Court principally relied upon *United States v. Causby*, 328 U.S. 256 (1946). *Webb's*, 449 U.S. at

C. The Per Se Takings Rule

The Supreme Court clearly established the per se takings rule in *Loretto v. Teleprompter Manhattan CATV Corp.*[22] In *Loretto*, a residential building owner in New York City claimed that the state violated her Fifth Amendment rights when it required her to allow cable television companies to install cable infrastructure upon and within her building.[23] The Court held that a government-authorized physical occupation of private property constitutes a per se taking.[24] The Court rejected arguments emphasizing public benefit, stating that a per se taking is compensable regardless of significant public policy concerns.[25] The Court reasoned that a physical

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164. In *Causby*, the Court held that airplane flights which continuously and directly interrupt the use of land constitute a compensable taking. *Causby*, 328 U.S. at 266.

[22] 458 U.S. 419 (1982).

[23] *Loretto*, 458 U.S. at 424. The state had passed legislation that required landlords to permit the installation of cable infrastructure upon their property, regardless of whether the infrastructure actually serviced the televisions of the tenants. *Id.* at 423-24. The legislation also prevented the landlords from requiring any compensation beyond an amount set by a state commission. *Id.* at 423. The state commission "ruled that a one-time $1 payment is the normal fee to which a landlord is entitled." *Id.* at 423-24.

[24] *Id.* at 441. The Court emphasized that it was not creating a new rule, only clearly identifying a historically established one. *Id.* at 428; *see* Sanguinetti v. United States, 264 U.S. 146, 149 (1924) (stating that "an actual, permanent invasion of the land" creates "an enforceable liability against the government"); United States v. Cress, 243 U.S. 316, 326 (1917) (holding that permanent flooding caused by construction of public dam was compensable and stating that "the authority to make . . . improvements . . . must be exercised . . . in subordination to the 5th Amendment"). *But see* Kathy L. Beich, Note, *Constitutional Law—New York Cable Television Statute Works a "Taking"*, 29 WAYNE L. REV. 1245, 1246-48 (1983) (reviewing historical precedent and concluding that no per se rule ever existed).

In addition to permanent physical invasions or occupations as established by *Loretto*, the Court in 1992 identified another category of taking that falls under the per se classification. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-16 (1992). Justice Scalia stated that governmental regulation will be considered compensable per se when it "denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. *But see* Yee v. City of Escondido, Cal., 503 U.S. 519, 522 (1992) (distinguishing physical occupation as only category of taking that requires per se classification). For a scholarly analysis of the accuracy of Justice Scalia's categorical assertions in *Lucas*, see Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1415-21 (1993).

[25] *Loretto*, 458 U.S. at 426. The irrelevance of public benefit to the per se rule

invasion represents a severe intrusion upon the venerated nature of traditional property rights and thus deserves a per se classification.[26]

D. Expanding the Types of Property Subject to Takings Law

In *Phillips v. Washington Legal Foundation*,[27] the Supreme Court addressed whether the accrued interest on IOLTA accounts is considered private property for the purposes of a takings analysis.[28] In *Phillips*, the TEAJF claimed that its IOLTA program was an exception to the traditional rule that interest always follows principal.[29] The Court rejected this assertion, holding that interest generated from IOLTA accounts belongs to the owner of the principal as a property right.[30] The Court reasoned that property does not have to

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greatly concerned the dissenters. *Id.* at 455 (Blackmun, J., dissenting). The dissent stated that the majority's decision "represents an archaic judicial response to a modern social problem," and that it frustrates the "legislative determination" of beneficial public policy. *Id.* at 455-56 (Blackmun, J., dissenting).

[26] *Loretto*, 458 U.S. at 435-36. The Court did state that the physical invasion or occupation must possess a permanent quality and not be merely temporary. *Id.* at 435 n.12. *Compare* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83-84 (1980) (asserting that physical invasion is not determinative when nature of interference is limited by time and place), *with Causby*, 328 U.S. at 261 (illustrating that frequency of interference was "as if the United States had entered upon the surface of the land and taken exclusive possession of it"). Within the "bundle of sticks" associated with property ownership, the Court identified three traditional rights that a per se taking erodes. *Loretto*, 458 U.S. at 435-36; *see also* United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945) (reiterating traditional right of owner "to possess, use and dispose" of property). The Court stated that the deprivation of these rights from the property owner represents a special kind of injury compensable "without regard to whether the action achieves an important public benefit." *Loretto*, 458 U.S. at 434-35.

[27] 524 U.S. 156 (1998).

[28] *Phillips*, 524 U.S. 160. The *Phillips* Court did not conduct a complete takings analysis. *Id.* at 172. The scope of the Court's decision touched only on the status of the property itself. *Id. But see id.* at 175 (Souter, J., dissenting) (asserting that resolving property issue without deciding takings issue is futile).

[29] *Phillips*, 524 U.S. at 167. For a recital of the facts and brief procedural history of *Phillips*, see *supra* notes 1-5 and accompanying text.

[30] *Phillips*, 524 U.S. at 167. The TEAJF argued that the IOLTA program fell under an exception to the interest-follows-principal rule similar to certain areas of marital and trust law. *Id.* The Court stated that such examples do not overcome the deference appropriately given to the Fifth Circuit in interpreting Texas law. *Id.*; *see* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 204 (1956) (stating

enjoy economically valuable status to warrant Fifth Amendment protection.[31]

III. *WASHINGTON LEGAL FOUNDATION V. TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION*

A. Opinion of the Court

In *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*,[32] the Fifth Circuit Court of Appeals held that the Texas IOLTA program constituted a per se taking in violation of the Fifth Amendment because the program permanently invaded private property.[33]

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that "special weight" is given to federal court interpretation of law of state in which they sit).

[31] *Phillips*, 524 U.S. at 170. The TEAJF argued that no property right could exist because funds in IOLTA accounts "'cannot reasonably be expected to generate interest income on their own.'" *Id.* at 169 (citation omitted). In response to this assertion, the Court stated that "[w]hile the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property." *Id.* at 170. Analogizing, the Court asserted that a governmental authority could not appropriate a landlord's rental income merely because it could prove that the landlord's costs outweighed his receivables. *Id.* Concluding, the Court noted that its decision did not affect the situation where a governmental authority is merely charging reasonable fees in exchange for services provided. *Id.* at 171; *see* United States v. Sperry Corp., 493 U.S. 52, 60 (1989) (asserting that wide latitude is given to government to charge user fees); Massachusetts v. United States, 435 U.S. 444, 463 n.19 (1978) (requiring only that user fees be "a fair approximation of the cost of benefits supplied" to pass constitutional muster). In addition to asserting that the property issue should not be separated from the takings issue, the dissent believed that the majority had emphasized the subjective outlook of the client too intensely. *Phillips*, 524 U.S. at 177 (Souter, J., dissenting); *see* United States v. 564.54 Acres of Land, 441 U.S. 506, 512 (1979) (contending that subjective or idiosyncratic value usually not considered in calculating just compensation); Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949) ("[L]oss to the owner of nontransferable values . . . is properly treated as part of the burden of common citizenship."). The dissent claimed that the purpose of just compensation was to put victims back in the position they would have been in had their property not been taken. *Phillips*, 524 U.S. at 177 (Souter, J., dissenting). This restitution process, the dissent claimed, would result in zero compensation for the clients because the original funds possessed no ability to generate net interest. *Id.* Justice Breyer also noted that it seemed absurd to label IOLTA interest as a property right when "in the absence of the lawful government 'taking,' there would have been no such property." *Id.* at 183 (Breyer, J., dissenting).

[32] 270 F.3d 180 (5th Cir. 2001).

[33] *Wash. Legal Found.*, 270 F.3d at 182, 186-87. Judge Barksdale delivered

The court initially reiterated that accrued interest from IOLTA accounts is considered a defendable property right encompassed by the same protections as any other type of property.[34] The court then examined whether the IOLTA program amounted to an unconstitutional taking prohibited by the Fifth Amendment.[35]

The court rejected use of the ad hoc balancing test, identifying the per se rule as the applicable legal device.[36] The court invoked precedent that mandated the use of the per se rule when the governmental act physically invades or occupies the property.[37] The court linked forced financial contributions to physical invasions upon real property, asserting that both forms of unconstitutional interference fall under the per se classification.[38] The TEAJF's arguments concerning the negative economic value of the IOLTA interest to the client were rejected by the court.[39] Furthermore, the court emphasized

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the Fifth Circuit's opinion, joined by Judge Garza. *Id.* at 182. The court's reasoning seemed to flow mostly from the identification of the per se rule as the applicable analysis rather than the ad hoc balancing test. *Id.* at 186.

[34] *Id.* at 185. Throughout the opinion, the court consistently grounded its points upon the *Phillips* decision. *Id.* at 186-89.

[35] *Id.* at 186. Because the court ultimately found the IOLTA program in violation of the Fifth Amendment, it declined to rule on the First Amendment issue. *Id.* at 185-86.

[36] *Id.* at 186. The court asserted that *Phillips*, *Webb's* and *Loretto* obligated the court to apply the per se rule. *Id.*

[37] *Id.* The court found the *Webb's* decision "most factually similar to the one at hand." *Id.* The court noted that the *Webb's* Court had principally relied upon the *Causby* decision, and that the *Causby* decision was explicitly categorized as a per se taking by the *Lucas* Court. *Id.* at 186-87. The court emphasized that a physical invasion could occur regardless of the type of property. *Id.*

[38] *Wash. Legal*, 270 F.3d at 186-87. The court broke down the apparent barrier between real property and personal property, suggesting that *Washington Legal* fell under the per se category along with *Loretto*, *Webb's* and *Causby*. *Id.*

[39] *Id.* at 187-88. The court stated that "a government's permanent physical occupation of property constitutes a per se taking, regardless of the economic impact on the owner." *Id.* at 187. The court also reiterated the *Phillips* Court's analogy that the government could not appropriate a landlord's rental income simply because the landlord's costs outweighed his cash receivables. *Id.* Concluding this point, the court stated that "a client's rights to possess, control, and dispose of the interest earned on his funds are valuable rights, regardless of whether the interest has economic value." *Id.* at 187-88.

that considerations of public benefit play no role in the per se analysis.[40]

The court noted that the mandatory nature of the IOLTA program deprives property owners of the ability to control their funds.[41] Such appropriation, the court explained, represents interference more severe than sheer regulation of the property's use.[42]

Due to the unavailability of monetary compensation,[43] the court analyzed the appropriateness of awarding equitable relief from the IOLTA program.[44] The court acknowledged that certain precedent suggested the unsuitability of equitable relief for Fifth Amendment takings cases.[45] However, the court distinguished a line of cases relating to forced contributions to governmental programs where injunctive and declaratory remedies were deemed an acceptable recompense.[46]

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[40] *Id.* at 187. The court invoked language from the *Phillips* decision, stating that "'[i]n general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.'" *Id.* (citation omitted).

[41] *Id.* at 188. The court emphasized the client's powerless state because "attorney participation in Texas' IOLTA program is mandatory," and thus "a client cannot avoid the appropriation of his interest by selecting an attorney who elects *not* to participate." *Id.* The court also noted that Internal Revenue Service rules recognize this deprivation of control, stating that "the IRS agrees not to tax clients on the interest generated by their funds in IOLTA accounts and paid to the TEAJF if they have no control over whether to participate in the program." *Id.*

[42] *Id.* The court maintained that an appropriation constitutes a greater governmental interference than a regulation. *Id.*

[43] *Wash. Legal*, 270 F.3d at 189. The monetary reimbursement claim had been denied on the grounds of Eleventh Amendment immunity earlier in the procedural history of the case. *Id.*

[44] *Id.* at 190-94. While the court pointed out that the IOLTA defendants had earlier conceded to be subject to declaratory and injunctive remedies, it conducted a rather exhaustive analysis of Fifth Amendment remedy law. *Id.*

[45] *Id.* at 190. The court examined cases where the takings victims had improperly pursued equitable relief when monetary compensation actually was available under alternative federal law. *Id.* at 190-92. These claims were denied as unripe. *Id.*

[46] *Id.* at 192-94. The court held that the ripeness doctrine did not preclude equitable relief in *Washington Legal* because "[i]f the interest earned on client-funds were available as just compensation for the clients, the very purpose of the program would be thwarted; therefore, it would defy logic . . . to presume the availability of a just compensation remedy." *Id.* at 194.

Finally, the court considered the legislative immunity of the Texas Supreme Court from claims seeking injunctive relief.[47] In addition to citing an earlier concession,[48] the court noted that while the Texas Supreme Court could not be enjoined from adopting rules, it could suffer restrictions on its enforcement abilities.[49]

B. Judge Wiener's Dissenting Opinion

Judge Wiener dissented in the *Washington Legal* decision and emphasized that a taking only becomes unconstitutional when it fails to provide just compensation in exchange.[50] Judge Wiener asserted that Washington Legal Foundation used the Fifth Amendment as a legal guise to attack the policy of the Texas IOLTA program.[51] Judge Wiener specifically criticized the majority for misconstruing the concession issue as it related to the Texas Supreme Court's claim of legislative immunity from equitable relief.[52] Finally, Judge Wiener

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[47] *Id.* The district court based its legislative immunity finding on the grounds that the justices possessed no authority to enforce the IOLTA program. *Id.*

[48] *Wash. Legal*, 270 F.3d at 194. The court suggested that the justices had conceded to being subject to equitable remedy on the prior appeal. *Id.*

[49] *Id.* at 195. The court pointed to a Supreme Court decision which asserted that justices of state supreme courts, "although legislatively immune from claims regarding the adoption of the challenged rules," could be "held liable in their enforcement capacities." *Id.*

[50] *Id.* at 197-98 (Wiener, J., dissenting). Judge Wiener suggested that when property is taken for public use, the taking only becomes unconstitutional when the government fails to offer just compensation. *Id.* Judge Wiener then offered his crucial point, stating that "'just compensation' is payment of value for equal value. None can argue that the equal value of zero is anything other than zero . . . ." *Id.* at 198.

[51] *Id.* at 203. Judge Wiener believed that Washington Legal Foundation's real aim was simply to challenge the legitimacy of the IOLTA program, a claim more appropriate for due process review than takings review. *Id.* Judge Wiener stated that "[i]t is important to remember that we cannot substitute concerns about due process . . . for concern about a taking, which turns on the availability of just compensation." *Id.*

[52] *Id.* at 197. Judge Wiener asserted that the Texas Supreme Court justices had merely conceded that the Eleventh Amendment was no bar to Washington Legal Foundation's claim for equitable relief, but not that they were subject to such claim. *Id.* Judge Wiener emphasized that "[a] concession that something is *not a bar* to a *claim* is a far cry from a concession that a plaintiff is *entitled* to *relief*." *Id.* (emphasis added).

opined that the cases on which the majority relied to grant declaratory and injunctive relief possessed no relevancy to the facts of *Washington Legal*.[53]

IV. DISCUSSION

In *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, the Fifth Circuit Court of Appeals expanded the scope of the stringent per se takings rule beyond the encompassment of real property.[54] The court emphasized the severity of governmental invasions and occupations, affording no deference to the beneficial results of the IOLTA program.[55] While the court championed the venerated rights of property owners, it offered little concern for the government's narrowing ability to exercise its traditional regulatory powers and to create public policy.[56]

By classifying a mandatory IOLTA program as a per se taking, the court has forced the states within its jurisdiction to render their IOLTA programs voluntary in order to pass constitutional muster.[57] Legal aid organizations may have to rely solely on meager public funding and charitable contribution.[58] With the Fifth Circuit's decision comes a split between

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[53] *Wash. Legal*, 270 F.3d at 201 (Wiener, J., dissenting). Judge Wiener pointed out that the plaintiffs in the cases that the majority relied upon had suffered actual monetary losses, stating that equitable relief "may offer one remedy for an unconstitutional taking, that is, an uncompensated taking; it is no *substitute*, however, for proof of loss." *Id.* (emphasis added).

[54] *See supra* note 38 and accompanying text. *Washington Legal* added yet another triumph for property owners in their battle against regulatory agencies. *See supra* note 9 and accompanying text.

[55] *See supra* notes 24-25, 40 and accompanying text. The irrelevance of public benefit to the per se takings analysis hinders policy creation and limits the government's ability to defend its programs . *See supra* note 25 and accompanying text.

[56] *See supra* notes 31, 42 and accompanying text. The traditional police and regulatory powers of government, at least in the takings arena, seem to be narrowing appreciably. *See supra* notes 16, 25 and accompanying text.

[57] *See supra* notes 31, 41 and accompanying text. Voluntary IOLTA programs would dispel the judiciary's concerns about the erosion of property rights. *See supra* notes 31, 41 and accompanying text.

[58] *See supra* notes 1, 16 and accompanying text. The decreased funding generated by voluntary IOLTA programs may result in significant losses to legal aid organizations. *See supra* note 1 and accompanying text.

circuits over what takings analysis to apply when scrutinizing IOLTA programs, thus increasing the possibility of a return trip to the Supreme Court.[59] In addition to choosing the proper analysis for IOLTA inquiries, the Supreme Court would need to clarify such issues as whether the per se takings rule can apply to all forms of property and the relative importance of government created value.[60] A Supreme Court review of the *Washington Legal* decision would entail significant ramifications for policy creation as well as a large body of takings jurisprudence.[61] Given the recent strengthening of Fifth Amendment protections, however, even a reversal of the *Washington Legal* decision would barely effect the established rights of property owners.[62]

The decision in *Washington Legal* has afforded Texas citizens a new escape from governmental policy impositions.[63] Although the line between private property protection and governmental regulatory competence will continuously fluctuate, *Washington Legal* exhibits the Fifth Circuit's suspicion that state governments often extend their policy creation beyond the limits of constitutional boundary.[64]

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[59] *See supra* notes 15, 33 and accompanying text. The split necessitates Supreme Court review, given the drastically different ramifications for both property owners and public policy beneficiaries. *See supra* notes 1, 16, 26 and accompanying text.

[60] *See supra* notes 31, 38 and accompanying text. A convincing argument is one that questions how property can be taken if the governmental action was the sole creator of the property itself. *See supra* notes 31, 50 and accompanying text.

[61] *See supra* notes 9, 16, 24, 33 and accompanying text. Clarification is needed within the takings encompassment, especially a separation between those cases which fall under the *Loretto* analysis and those which fall under the *Penn Central* analysis. *See supra* notes 15, 21, 24, 37 and accompanying text.

[62] *See supra* notes 9, 24-25, 30, 31 and accompanying text. The *Loretto* and *Phillips* decisions established a substantial shield against governmental regulation and interference. *See supra* notes 24-25, 30, 31 and accompanying text.

[63] *See supra* notes 33, 38-40 and accompanying text. However, *Washington Legal* has also depleted millions of dollars from a program through which thousands of low-income citizens retain legal representation on crucial issues in their lives. *See supra* note 1 and accompanying text.

[64] *See supra* notes 40, 42 and accompanying text. The strictness of the per se takings rule, especially its indifference to public benefit considerations, will cause lasting concerns for IOLTA proponents, including a number of state governments. *See supra* note 25 and accompanying text.

V. CONCLUSION

Washington Legal Foundation v. Texas Equal Access to Justice Foundation limits the capability of state governments to fund legal aid organizations through the appropriation of accrued interest on IOLTA accounts. In *Washington Legal*, the Fifth Circuit identified the per se takings rule as the appropriate analysis to apply when scrutinizing the constitutionality of IOLTA programs. By rejecting the ad hoc balancing test, the court established that public benefit serves as no justification when the government has physically invaded or occupied private property. While potentially subject to Supreme Court review, *Washington Legal* serves as a warning to state governments who fund public policy initiatives in violation of Fifth Amendment protections against unconstitutional takings.

John Moses

SUBJECT INDEX

ADMINISTRATIVE LAW
Supreme Court's Rejection of the New Nondelegation Doctrine 729-79
American Trucking Associations v. EPA 742-48
Chevron's Deference to Agency Interpretations of Regulations 766-69
Closing Remarks on Controlling Agency Discretion 776-79
Controlling Agency Discretion Under Administrative Procedure Act 762-66
EPA's Air Quality Standards for Particular Matter and Ozone 738-42
Importance of *American Trucking* 734-38
Introduction 729-34
Nondelegation Doctrine 748-50
Nondelegation Doctrine Revisited 769-76
Revival and Reinvention Doctrine 750-58
Benzene Decision 750-55
"Lockout Tagout" Cases 755-58
Whitman v. American Trucking Associations 758-62

ASBESTOS
Never-Ending Asbestos Crisis 1-34
Advocating a Global View 28-33
Bringing More Cases Before Fewer Judges 32
Controlling Claims by the Unimpaired 31
Proving Institutional Support 32-33
Strictly Enforcing Joinder and Venue Rules to Prevent Forum Shopping 31
Using Existing Tools 33
Courts as the Only Practical Solution 33-34
Current Asbestos Crisis 4-9
Introduction 1-4
Lack of Coordination Among the Courts 10-28
The Dilemma of the Unimpaired Claimant 10-14
Mass Joinders and Mass Trials 14-20
Medical Monitoring 20-26
Managing Punitive Damage Claims 26-28
Unintended Consequences in Asbestos Litigation 531-54

Conclusion 553-54
Introduction 531-36
Restoring the Rule of Law 548-53
Applying Sound Science 550-51
Requiring Plaintiffs to Prove Their Injuries Were Caused by the Defendants in the Case 551
Stopping Mass Consolidation 549
Using an Inactive Docket System 551-53
Stopping Retribution Against Defendants Who Try to Enforce Their Legal Rights 553
Unintended Consequences of Expedient Handling of Claims 536-48
Abandoning Procedural and Evidentiary 545-47
Compensation of Unimpaired Claimants 538-42
Improper Defendant Identification 547-48
Mass Consolidations 542-45
Principles 545-47

CAMPAIGN REFORM
Bipartisan Campaign Reform Act of 2001 275-300
Conclusion 297-300
Failed Reform Attempts of the 1980s 286-88
Federal Elections Act of 1974 281-86
Introduction 275-76
Observations and Suggestions for Change 296-97
Public Financing of Federal Elections 279-81
Section 304 of the Labor Management Relations Act of 1947 (Taft-Hartley Act) 276-79
Senator McCain's Uphill Battle 288-95

CIVIL PROCEDURE
See **MISSISSIPPI CIVIL PRACTICE & PROCEDURE**

CLASS ACTIONS
See **PARTIES TO ACTION**

CONSTITUTIONAL LAW
Mississippi
See **SLAVE LAW**
United States
See **EQUAL PROTECTION**
See **ESTABLISHMENT CLAUSE**
See **FIRST AMENDMENT PROTECTIONS**
See **JUDICIAL REVIEW**
See **SEARCH AND SEIZURE**

CONTRACTS
See **SLAVE LAW**

CRIMINAL LAW
See **HOMICIDE**
See **SLAVE LAW**

EQUAL PROTECTION
Settlement in *Ayers v. Fordice* and Mississippi Higher Education
Desegregation or a Separate but 'More Equal System .. 1011-27
Ayers Settlement 1019-23
Conclusion 1027
Evaluation of the Settlement 1023-26
Admissions Policies 1023-24
Existence of Eight Universities 1025-26
Mission Classifications 1025
Unnecessarily Duplicated Programs 1024-25
Fordice Decision 1014-19
Fordice's New Standard 1017-18
Historical Look at *Ayers* 1014-15
Implications of the *Fordice* Decision 1018-19
Influential Cases 1014-17
Implications of *Brown v. Board of Education* 1012-14
Effect of *Brown* on Mississippi 1013–14
Introduction 1011-12

ESTABLISHMENT CLAUSE
See **FIRST AMENDMENT PROTECTIONS**
Federal Faith-Based and Community Initiative 241-74
Ashcroft's Charitable Choice as the Model 257-60
Conclusion 273-74
Construction of Future Litigation 260-73
Effect 265-73
Definition of Recipients 267-68
Entanglement 265-67
Indoctrination 268-73
Aid in the Form of Cash 269-70
Aid That Is Too Substantial 272-73
Aid That Supplants 272
Aid with Religious Content 270-71
Divertibility of Aid 271
General 260-63
Method Funding 263-64
Purpose 264-65
Introduction 241-44

(**ESTABLISHMENT CLAUSE**-Federal Faith-Based and Community Initiative continued)

Related Law 244-56
Educational Religious Entities 249-56
Agostini v. Felton 251-53
Lemon v. Kurtzman 249-50
Mitchell v. Helms 253-56
Non-educational Religious Entities 245-49
Bowen v. Kendrick 247-49
Bradfield v. Roberts 245-46

EVIDENCE
Navigating the Maze of Evidence of Character and Other Admissibility of Other Crimes, Wrongs or Acts 880-997
Procedural Issues 881-916
Admissibility and Conditional Relevancy 904-05
"Chilling Effect" or Ruling or Not in Advance . 905-08
Judicial Duties 883-88
Misnomer of Sua Sponte Rule 403 Balancing .. 888-97
Probative v. Prejudice Balancing of Past Acts 888-97
Probative v. Prejudice When Committed by Another 897
Predicate for Admissibility 883
Burden of Proof 883
Elements 883
Required Limiting Instruction 898-904
Saving Error 912-16
Waiver or Error 908-12
Listed Other Purposes 916-52
Identity 945-49
Intent 928-37
Intent to Distribute Drugs 929-33
Intent in Non-Drug Cases 933-37
Knowledge 943-44
Motive 916-27
No Mistake or Accident 949-52
Opportunity 927-28
Plan/Scheme 939-43
Preparation 937-39
Unlisted Other Purposes 952-97
Bias or Interest of Witness 996-97
Conspiracy 992-94
Element of Crime Charged 989-92

(**EVIDENCE**-Navigating the Maze of Evidence of Character and Other Admissibility of Other Crimes, Wrongs or Acts-Unlisted Other Purposes continued)

Guilty Knowledge/Coverup 981-85
Interrelated Events/Explain Events/Complete Story 952-71
Lustful Disposition Toward Victim of Sex Crime 976-81
Predisposition in Rebuttal of Entrapment Defense 971-76
Sentencing 994-96
Volunteered Reference to Defendant's Other Crimes 985-89
Victim's State of Mind 996
Crimes, Wrongs or Acts in Criminal Cases 835-997
Excluding Character Evidence to Prove Propensity to Commit Crimes 842-80
Exceptions to the Rule 857-80
Defendants Character in Issue 858-70
Character in Issue by Accident 861-66
Character in Issue by Design 859-61
Limits to the Open Door 867-70
Victim's Character in Issue 870-80
Victim's Traits Other Than for Violence 872-73
Victim's Propensity for Violence to Prove Victim was First Aggressor 873-77
Victim's Propensity for Violence to Prove Victim's Justifiable Fear 877-80
The Maze 838-42
Goff v. State 841-42
Miss. R. Evid. 404 838-39
Miss. R. Evid. 405 839-40
Newsom v. State 840-41

FAMILY LAW
Family Law at the Turn of the Century 781-834
Agreements Altering Rights During Marriage and Upon Divorce 818-21
Alimony 799-806
Traditional Alimony 799-802
Alimony in Transition 802-03
Alimony in Mississippi 803-06
Child Custody 806-13
Joint Custody 808-10

(**FAMILY LAW**-Family Law at the Turn of the Century-Child Custody continued)

Marital Fault/Sexual Conduct 810-13
Maternal Preference Rule 806-08
Child Support 813-18
Federal Intervention 813-16
Mississippi Guidelines 816-18
State Court Discretion 813
Conclusion 833-34
Entry into the Marriage Relationship 829-33
Grounds for Divorce 782-89
Divorce Reform 784-86
Fault-Based System of Divorce 782-84
Irreconcilable Differences Divorce in Mississippi ... 786-89
Introduction 781-82
Property Division 789-99
Adoption of Equitable Distribution 793-95
Equitable Distribution in Mississippi 795-99
Property Division Reform 791-93
Title System 789-91
Rights and Duties During Marriage 822-29
Duty of Support 823-26
Tort Actions 826-29

FIRST AMENDMENT PROTECTIONS
Religious Viewpoint Discrimination Prohibited in Public Forum 305-24
Good News Club v. Milford Central School 305-08, 317-21
Conclusion 323
Concurring Opinions 318-20
Justice Breyer 319-20
Justice Scalia 318-19
Discussion 322-23
Dissenting Opinions 320-21
Justice Souter 321
Justice Stevens 320-21
Facts 305-08
Opinion of the Court 317-18
Related Law 308-16
Distinguishing Subject Matter from View Point Discrimination in Limited Public Forums 311-12
Public Forum Doctrine 309-11
Religious Groups Can Use Public Facilities Without Violating Establishment Clause 313-14
Religious Neutrality Requisite 315-16

HOMICIDE
Murder and Manslaughter in Mississippi 35-152
The Confusion of Mens Rea for Murder and Manslaughter 138-46
Inconsistent Evaluations of Evidence 139-140
Inconsistent Law Governing Jury Instructions 141-46
Historical Background 39-98
Common Law 39-51
Non Common Law Jurisdictions 51-52
Introduction 37-39
Mens Rea for Unintentional Murder and Manslaughter . 105-137
Culpable Negligence Manslaughter 124-137
Depraved Heart Murder 105-124
Mississippi Statutory Treatments of Murder 53-98
Consolidation and Simplification (1857) 72-80
Early State Legislation 1817-1824 57-59
Mississippi Territory 1789-1817 53-56
Modern Adjustments 80-89
Penitentiary Code of 1839 60-72
Unintended Killings Under the Current Code 89-98
Resolving the Prevailing Confusion 146-52
Judicial Clarification 151-52
Statutory Reform 147-51
Unintentional Criminal Homicide in Other Jurisdictions . 99-104
Model Penal Code 101-04
Manslaughter 103
Murder 101-03
Negligent Homicide 103
States and Federal Government 99-101

JOINDER OF ACTIONS
See **PARTIES TO ACTION**

JUDICIAL REVIEW
Constitutionality of Punitive Damages Awards Must Be
Reviewed De Novo 711-27
Cooper Industries, Inc. v. Leatherman
Tool Group, Inc. 711-13, 721-26
Conclusion 727
Concurring Opinions 724-25
Justice Scalia 724-25
Justice Thomas 724
Discussion 726-27
Dissenting Opinion
Justice Ginsburg 725-26
Facts 711-713

(**JUDICIAL REVIEW**-Constitutionality of Punitive Damages Awards Must Be Reviewed De Novo-*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* continued)

Opinion of the Court 721-23
Related Law 713-21
Constitutionality of Punitive Damages 713-15
Constitutional Review of Punitive Damages Awards 717-19
Procedural Due Process Limitations on Punitive Damages Awards 715-17
Substantive Due Process Limitations on Punitive Damages Awards 720-21

JUVENILE JUSTICE
Mississippi
Consequences of Lifting Confidentiality Requirements . 999-1009
Conclusion 1009
Confidentiality and the History of Juvenile Court . 1002-05
Consequences of Youth Court Delinquency Proceedings 1006-09
Introduction 1000-02
Mississippi Youth Court Confidentiality Law 1005-06

MANSLAUGHTER
See **HOMICIDE**

MISSISSIPPI CIVIL PRACTICE & PROCEDURE
See also **PARTIES TO ACTION**
How Mississippi Became Lawsuit Central for the United States 347-59
Mississippi Civil Procedure 483-86
"90-Day" Discovery Rule 483-84
Appeal Bond Requirements 486
Forum-Shopping 486
Judicial Discretion 486
Permissive Joinder 485-86
Venue 486
Overview of the Unique Aspects of Mississippi's Civil Justice System 359-94
How the Proliferation of Lawsuits Hurts Mississippi 362-67
How the Substantive Law of Mississippi Helps Attract Lawsuits 385-94
Limits on Noneconomic Damages 388-90
Mississippi Law Regarding Innocent Product Sellers 390-94

(**MISSISSIPPI CIVIL PRACTICE AND PROCEDURE**-Overview of the Unique Aspects of Mississippi's Civil Justice System-How the Substantive Law of Mississippi Helps Attract Lawsuits continued)

Punitive Damages 385-88
Nature of the Problem 385-87
Proportionality as a Better Approach 387-88
Introduction 359-62
Mississippi's Unique Procedural Laws 367-78
Joinder 369-77
Abuse of Rule 20 Joinder 369
Class Actions v. Rule 20 Joinder 369-73
Confusion Caused by *American Bankers* Misapplication of Rule 20 Joinder 373-77
Venue Rules 377-78
Suggestions for Change in Mississippi's Procedural Rules 379-85
Adopting a Limited Class Action Rule 382-85
Class Actions in Mississippi 384-85
Criticism of Class Actions 383-84
Clarifying and Reforming Appeal Bond Requirements 379-81
Better Proposal 380-81
Recent Reform 380
Reforming the Venue Rule 382
Returning to Rule 20 Joinder to Its Intended Use .. 381-82
Conclusion 394
Problems, Opportunities and Some Suggested Repairs 395-421
Capping Appeal Bonds 403-04
Conclusion 420-21
Improving Mississippi's Civil Justice System 419-20
Mississippi's Crisis in Medical Liability 417-19
"Outlier" Punitive Damages Verdicts 399-402
Expanding the Tobacco Litigation Model 411-14
Judicial Branch as First Among Equals 409-11
Public Litigation for Private Profit 407-09
Regulation Through Litigation 404-17
Some Solutions 414-17
Fairness in Litigation 415-17
Private Attorney Retention Sunshine Act 414-15
Overview 396-99

MISSISSIPPI TORT CLAIMS ACT
Is Discretionary Immunity Useless? 695-710
Background 697-99
Conclusion 706-10

(MISSISSIPPI TORT CLAIMS ACT- Is Discretionary Immunity Useless? continued)
Discretionary Function Exception 700-03
Introduction 695-97
Recent Cases 704-06

MURDER
See **HOMICIDE**

PARTIES TO ACTION
See also **ASBESTOS**
See also **MISSISSIPPI CIVIL PRACTICE & PROCEDURE**
Class Actions & Joinder in Mississippi 447-66
Changing Purpose of Civil Litigation in a Post-Industrial World 450-51
Class Actions in Modern America 452-53
Nationwide Move to State Courts 452-53
Non-Federal Question Class Actions 452
Conclusion 466
Introduction 447-49
Mass Litigation in Mississippi 453-61
Aggregation of Individual Cases 455-57
"Ancient Remedy" of Equitable Class Actions 457-59
Individual Punitive Damages 459-61
Problems with Current Situation 461-65
Effective Denial of Access to the Courts 465
"Federalization" of Common Law 462-63
Multi-district Litigation 463-64
Problems with Proposed Solution 465

PUBLIC FORUM DOCTRINE
See **FIRST AMENDMENT PROTECTIONS**

PUNITIVE DAMAGES
Awards After *Cooper Industries v. Leatherman Tool Group* 569-75
Elements of Punitive Damage Award in Mississippi 595
Mississippi Punitive Damages Statute 591-93
Mississippi Standards of Review 594-95
Percentage Net Worth of Tortfeasor as a Punitive Damages Factor 596-97
Ratio of Actual to Punitive 595-96
United States Constitutional Issues 593-94
Why Mississippi Needs to Pay Attention to National Trends . . 569-74

SEARCH AND SEIZURE
Thermal Imaging Constituting an Unreasonable Search 325-41
Kyllo v. United States 325-26, 335-38
Conclusion 340-41
Discussion 338-40
Dissenting Opinion 337-38
Justice Stevens 337-38
Facts 325-26
Opinion of the Court 335-37
Related Law 326-35
Constitutionality of Warrantless Visual Surveillance 332-33
Limits on Warrantless Monitoring 330-31
Reasonable Expectation of Privacy 328-30
Warrantless Searches of Items Exposed to the Public 334-35

SLAVE LAW
Slavery Law in Mississippi from 1817-1861 153-239
A Federal Institution 161-63
Closing Remarks 229-39
Contracts 205-06
Bill of Sale 205
Breach of Warranty 205
Warranty of Soundness 205
Illegal Contracts 205
Failed Attempt to Prevent Mercantile Importation of New Slaves 206-11
Introduction 153-161
Mississippi Constitutions of 1817 and 1832 164-66
Mississippi Slave Code 166-74
Mississippi Supreme Court and Race 174-88
Post-*Dred Scott* Polarization of the High Court 215-29
The Slave and Criminal Law 188-204
Confessions and the Exclusionary Rule 191-97
Mere Technicalities 188-91
Trials and Tribulations of *Josephine* 197-204
Torts 205
Respondeat Superior 205
Uncomely Devise of Comity 211-14

SYMPOSIUM
Asbestos Issues 517-30, 555-66
Introductions and Welcome 343-46

(**SYMPOSIUM** continued)

Luncheon Featuring Former Attorney General Dick Thornburgh 505-15
Mississippi Civil Procedure 437-45, 473-82, 487-504
Punitive Damages: How and How Much . 567-68, 577, 585-89, 605-12
Regulation Through Litigation 613-29, 693
Why Are We Here: How Mississippi Became Lawsuit Central 347-57, 423-35

TAKINGS CLAUSE
Mandatory IOLTA Program Constitutes Taking 1029-44
Wash. Legal Found. v. Tex. Equal Access to Justice Found. 1029-31, 1038-42
Conclusion 1044
Discussion 1042-43
Dissenting Opinion 1041-42
Facts 1029-31
Opinion of the Court 1038-41
Related Law 1031-38
Ad Hoc Balancing Test 1033-34
Unconstitutionality of Forced Constitution . . 1034-35
Per Se Takings Clause 1036-37
Expanding Scope of Takings Clause 1037-38

THERMAL IMAGING
See **SEARCH AND SEIZURE**

TORT LAW
See **SLAVE LAW**
Regulation Masquerading as Judgment 631-91
Firearms Lawsuits 638-56
Conclusion 654-56
Legal Flaws of Firearms Suits 640-52
No Damages 640-42
No Defective Design 645
No False Advertising 651-52
No Nuisance 646-51
No Proximate Causation 642-44
No Wrongdoing 644-45
Postscript on Gun Related Violence 652-54
Introduction 632-34

(**TORT LAW**-Regulation Masquerading as Judgment continued)

Lead Paint Lawsuits 666-85
Conclusion 684-85
Lead Blood Levels and Human Health 670-85
Creation of New Paradigm 676-78
Liability of Lead Paint Manufacturers to Cities . . 681
Liability of Lead Paint Manufacturers to Individuals 678-81
No Causation 682-83
No Damages 683-84
No Wrongdoing 681-82
Old Paradigm 670-74
Upsetting of Old Paradigm 674-76
Lead in Paint 667-69
Private Ordering v. Public Ordering 634-38
Public Ordering Alternatives to Regulatory Tort Suits . . . 685-91
Collateral Damage 688-89
Conclusion 689-91
Prohibition 687-88
Taxation 686-87
Tobacco Lawsuits 656-66
Illegality of State Tobacco Suits 661-63
Illusory Underpinnings of State and Federal Lawsuits 657-61
No Damages to Which Government May Be Subrogated 659-61
No Direct Government Damages 657-58
Outrage of Federal Tobacco Suit 663-66

Articles

BY TITLE

CLASS ACTIONS AND JOINDER IN MISSISSIPPI .... *Richard T. Phillips* 447

FAMILY LAW AT THE TURN OF THE CENTURY ..... *Deborah H. Bell* 781

THE LAW OF UNINTENDED CONSEQUENCES IN ASBESTOS LITIGATION: HOW EFFORTS TO STREAMLINE THE LITIGATION HAVE FUELED MORE CLAIMS ..... *Victor E. Schwartz and Rochelle M. Tedesco* 531

LIFE IN LAWSUIT CENTRAL: AN OVERVIEW OF THE UNIQUE ASPECTS OF MISSISSIPPI'S CIVIL JUSTICE SYSTEM .... *David W. Clark* 359

MISSISSIPPI'S CIVIL JUSTICE SYSTEM: PROBLEMS, OPPORTUNITIES AND SOME SUGGESTED REPAIRS ..... *Sherman Joyce and Michael Hotra* 395

MURDER AND MANSLAUGHTER IN MISSISSIPPI: UNINTENTIONAL KILLINGS *Michael H. Hoffheimer* 35

NAVIGATING THE MAZE OF EVIDENCE OF CHARACTER AND OTHER CRIMES, WRONGS OR ACTS: MISSISSIPPI RULES OF EVIDENCE 404 AND 405 IN CRIMINAL CASES *Tom R. Mason* 835

PUNITIVE DAMAGES AWARDS AFTER *COOPER INDUSTRIES V. LEATHERMAN TOOL GROUP* ..... *William Bradford Reynolds* 569

REGULATION MASQUERADING AS JUDGMENT: CHAOS MASQUERADING AS TORT LAW ..... *Michael I. Krauss* 631

SLAVE LAW IN MISSISSIPPI FROM 1817-1861: CONSTITUTIONS, CODES AND CASES ..... *Michael P. Mills* 153

THE SUPREME COURT REJECTS THE NEW NONDELEGATION DOCTRINE: IMPLICATIONS FOR THE ADMINISTRATIVE STATE ..... *Frona M. Powell* 729

WHAT COURTS CAN DO IN THE FACE OF THE NEVER-ENDING ASBESTOS CRISIS . . . . . *Paul F. Rothstein* 1

WHY MISSISSIPPI NEEDS TO PAY ATTENTION TO NATIONAL TRENDS ON PUNITIVE DAMAGES . . . . . *Reuben V. Anderson* 579

Articles

BY AUTHOR

Reuben V. Anderson
WHY MISSISSIPPI NEEDS TO PAY ATTENTION TO NATIONAL TRENDS ON PUNITIVE DAMAGES 579

Deborah H. Bell
FAMILY LAW AT THE TURN OF THE CENTURY 781

David W. Clark
LIFE IN LAWSUIT CENTRAL: AN OVERVIEW OF THE UNIQUE ASPECTS OF MISSISSIPPI'S CIVIL JUSTICE SYSTEM 359

Michael H. Hoffheimer
MURDER AND MANSLAUGHTER IN MISSISSIPPI: UNINTENTIONAL KILLINGS 35

Michael Hotra and Sherman Joyce
MISSISSIPPI'S CIVIL JUSTICE SYSTEM: PROBLEMS, OPPORTUNITIES AND SOME SUGGESTED REPAIRS 395

Sherman Joyce and Michael Hotra
MISSISSIPPI'S CIVIL JUSTICE SYSTEM: PROBLEMS, OPPORTUNITIES AND SOME SUGGESTED REPAIRS 395

Michael I. Krauss
REGULATION MASQUERADING AS JUDGMENT: CHAOS MASQUERADING AS TORT LAW 631

Tom R. Mason
NAVIGATING THE MAZE OF EVIDENCE OF CHARACTER AND OTHER CRIMES, WRONGS OR ACTS: MISSISSIPPI RULES OF EVIDENCE 404 AND 405 IN CRIMINAL CASES 835

Michael P. Mills
SLAVE LAW IN MISSISSIPPI FROM 1817-1861: CONSTITUTIONS, CODES AND CASES 153

Richard T. Phillips
CLASS ACTIONS AND JOINDER IN MISSISSIPPI 447

Frona M. Powell
THE SUPREME COURT REJECTS THE NEW NONDELEGATION DOCTRINE: IMPLICATIONS FOR THE ADMINISTRATIVE STATE 729

William Bradford Reynolds
PUNITIVE DAMAGES AWARDS AFTER *COOPER INDUSTRIES V. LEATHERMAN TOOL GROUP* 569

Paul F. Rothstein
WHAT COURTS CAN DO IN THE FACE OF THE NEVER-ENDING ASBESTOS CRISIS 1

Victor E. Schwartz and Rochelle M. Tedesco
THE LAW OF UNINTENDED CONSEQUENCES IN ASBESTOS LITIGATION: HOW EFFORTS TO STREAMLINE THE LITIGATION HAVE FUELED MORE CLAIMS 531

Rochelle M. Tedesco and Victor E. Schwartz
THE LAW OF UNINTENDED CONSEQUENCES IN ASBESTOS LITIGATION: HOW EFFORTS TO STREAMLINE THE LITIGATION HAVE FUELED MORE CLAIMS 531

COMMENTS

THE FEDERAL FAITH-BASED AND COMMUNITY INITIATIVE:
A GUIDE FOR FUTURE LEGISLATION ..... *Brian Craig Kimball* 241

MISSISSIPPI TORT CLAIMS ACT:
IS DISCRETIONARY IMMUNITY USELESS? ..... *Robert F. Walker* 695

REVEALING MISSISSIPPI YOUTH COURT: THE CONSEQUENCES
OF LIFTING CONFIDENTIALITY REQUIREMENTS ON JUVENILE
JUSTICE IN MISSISSIPPI ..... *Melissa C. Walker* 999

A SETTLEMENT OF *AYERS V. MUSGROVE*: IS MISSISSIPPI
MOVING TOWARDS DESEGREGATION IN HIGHER EDUCATION
OR MERELY A SEPARATE BUT 'MORE EQUAL' SYSTEM?
..... *Molly L. Mitchell* 1011

A SHORT HISTORY OF THE BIPARTISAN
CAMPAIGN REFORM ACT OF 2001 ..... *Karen Griffin Kaldahl* 275

RECENT DECISIONS

CONSTITUTIONAL LAW

FIFTH AMENDMENT—TAKINGS CLAUSE—MANDATORY IOLTA PROGRAM CONSTITUTES PER SE TAKING . *John T. Moses* 1029

FIRST AMENDMENT—SPEECH DISCUSSING OTHERWISE PERMISSIBLE SUBJECTS CANNOT BE EXCLUDED FROM A LIMITED PUBLIC FORUM ON THE GROUND THAT THE SUBJECT IS DISCUSSED FROM A RELIGIONS VIEWPOINT . . . . . *Bradley Sanders* 305

FOURTH AMENDMENT—THE WARRANTLESS USE OF THERMAL IMAGING TECHNOLOGIES IS UNCONSTITUTIONAL . . . . . *Hunter Carpenter* 325

JUDICIAL REVIEW—APPELLATE COURTS MUST REVIEW DE NOVO THE CONSTITUTIONALITY OF PUNITIVE DAMAGES AWARDS . . . . . *R. Shane McLaughlin* *711*

TABLE OF CASES

A

Acceptance Ins. Co. v. Brown 572
Adams v. State 948-49
Agostini v. Felton 245, 249, 251-53, 263, 273
Agular v. Felton 248, 251-52
Aetna Cas. & Sur. Co. v. Day 600
Aetna Life Ins. Co. v. Lavoie 714
Ainsworth v. State 854-55, 953, 967
Ala. State Teachers Ass'n v. Ala. Pub. Sch. & Coll. Auth. 1015
A.L.A. Schechter Poultry Corp. v. United States 735, 737, 749-50, 752
Albright v. Albright 807-08, 811
Alford v. State 936
Alfred v. State 189
Allegheny County v. ACLU 308
Allen v. R&H Oil & Gas. Co. 463
Allen v. State 980
Amchem Prods., Inc. v. Windsor 33, 385, 538, 548
Am. Bankers Ins. Co. v. Alexander 16, 369-70, 374-76, 455-57, 485-86
Am. Bankers Ins. Co. v. Booth 459
Am. Petroleum Inst. v. OSHA 751
Am. Power & Light Co. v. SEC 749
Am. Transfer & Storage Co. v. Brown 635
Am. Trucking Ass'ns v. EPA (1999) 175 . . . . . 734-37,742-44, 747, 759
Am. Trucking Ass'ns v. EPA (1999) 195 742
Anderson v. Jackson Mun. Airport Auth. 697
Anderson v. State (1946) 150
Anderson v. State (1999) 964
Andrew Jackson Life Ins. Co. v. Williams 595, 599
Andrews v. Am. Tel. & Tel. Co. 453
Arave v. Creech 81-83
Ark. Educ. Television Comm'n v. Forbes 310
Armstong v. Armstrong 800, 802
Armstrong v. State 984
Arnold v. State Farm Fire & Cas. Co. 360, 396
Asbestos Cases, *In re* 542
Asbestos Litig., *In re* 28

Asbestos Pers. Injury Litig., *In re* 18
Asbestos Prods. Liab. Litig., *In re* 11
Atkinson v. State 129
Austin v. Austin 823
Ayers v. Allain (1987) 1011, 1013, 1015
Ayers v. Allain (1990) 1015, 1017
Ayers v. Ayers 789
Ayers v. Musgrove 1011

B

Badillo v. Am. Brands, Inc. 21, 541
Baehr v. Lewin 832
Baehr v. Miike 832
Bailey v. Bailey 817
Bailey v. State 125, 135
Baine v. State 956, 986
Baker v. State 832
Baldwin v. State (1999) 988
Baldwin v. State (2000) 984-85
Ball v. Joy Mfg. Co. 21
Ballenger v. State 959, 982
Baltimore City Asbestos Pers. Injury & Wrongful Death Cases, *In re* .. 19
Baltimore Gas & Elec. Co. v. Natural Res. Def. Council 764
Bangren v. State 79, 149
Bankers Life & Cas. Co. v. Crenshaw 600, 720
Banks v. State(1988) 88-89
Banks v. State (1997) 849-50
Bankston v. Westinghouse Elec. Corp. 16
Barbetta v. State 979
Barnes v. Singing River Hosp. Sys. 420
Bartlett v. Coullett 454, 459
Bass v. State 114
Beaumont v. Fed. Election Comm'n 278
Beck v. Alabama 142
Beckwith v. Webb's Fabulous Pharmacies, Inc. 1035
Beckman v. State 126, 129
Bell v. State 862, 963
Bennett v.State 947-48, 963
Benson v. Benson 783-84
Berkovitz v. United States 702
Bernhardt v. Polygraphic Co. of Am. 1037-38
Bernier v. Raymark, Inc. 679
Beshada v. Johns-Manville Prod. Corp. 679
Beta Beta Chapter of Beta Theta Pi Fraternity v. May 599
Bhandari v. First Nat. Bank of Commerce 601

Bishop v. Gen. Motors Corp. 27
Bishop v. State 902-03
Blackenship v. Gen. Motors Corp. 29-30
Blanks v. State (1989) 542 108
Blanks v. State (1989) 547 . . . . . 118, 121, 134, 139, 547, 844-45
Blessing v. United States 702-03
Blevins v. Bardwell 808
Blue v. State 76, 82
BMW of N. Am., Inc. v. Gore 387, 402, 569-71, 580, 593, 595, 720-21
Bd. of Educ. v. Allen 273
Bd. of Educ. v. Grumet 315
Bd. of Educ. v. Mergens 316
Bd. of Visitors of the Coll. of Wm. & Mary v. Norris 1015
Bob Jones Univ. v. United States 271
Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass'n 599
Boggan v. State 979
Booker v. State (1997) 82
Booker v. State (1998) 863-64
Borel v. Fibreboard Corp. 1
Bosarge v. State 972-73
Bounds v. State 887, 996
Bourgeois v. A.P. Green Indus., Inc. (1998) 24, 25, 26
Bourgeois v. A.P. Green Indus., Inc. (2001) 25, 26
Bowe v. Sec'y of the Commonwealth 277
Bowen v. Am. Hosp. Ass'n 764
Bowen v. Gilliard 1033
Bowen v. Kendrick 245, 247-49, 258, 269, 271, 314
Bower v. Westinghouse Elec. Corp. 541
Boyle v. United Technologies Corp. 702
Brabham v. Brabham 814
Bradfield v. Roberts 245-46
Bradford v. State (1930) 128
Bradford v. State (2000) 900-01, 950
Bradley v. State (1924) 59-60
Bradley v. State (1990) 955, 997
Brazan v. Brazan 810
Brazemore v. Friday 1015-16
B.R.C. *ex rel.* S.C. v. State 937, 952
Breard v. City of Alexandria 329
Breed v. Jones 1003
Brennan v. Orban 827
Brenner v. Am. Cyanamid Co. 680
Brewer v. Burdette 696, 700, 704-05, 708
Bridges v. McCraken 804
Brien v. Williamson 209-10

Brinegar v. United States 329
Brooks v. Brooks 783
Brooks v. State 948
Brown v. Am. Transfer & Storage Co. 635
Brown v. Bd. of Educ. (1954) 1012
Brown v. Bd. of Educ. (1955) 1013
Brown v. Brown 807
Brown v. State (1988) 954-55
Brown v. State (1996) 982-83
Brown v. State (1999) 749 ..... 871, 876
Brown v. State (1999) 768 78
Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc. 713-15
Bruce v. State 113
Bryant v. State (1990) 823
Bryant v. State (1998) 930
Buckley v. Valeo 281-85, 298
Bullock v. Bullock 784
Burge v. State 133, 138
Burns v. State 923
Burkett v. Freedom Arms, Inc. 645
Burlington Truck Lines, Inc. v. United States 745, 766
Burnett v. State 108
Burns v. Burns 826-27
Burrell v. State 850
Burson v. Freeman 310
Bush v. Gore 147
Butler v. State (1979) 133
Butler v. State (1992) 76
Byrd v. State 188-89

C

C & C Trucking Co. v. Smith 595-97, 599
Caldwell v. State 149
California v. Ciraolo 332-33
California v. Greenwood 334-35
Cal. Med. Ass'n v. FEC 286
Camara v. Mun. Court 327
Campbell v. State (1973) 128, 137
Campbell v. State (1999) 852-53
Cantave v. Peterson 683
Capitol Square Rev. & Advisory Bd. v. Pinette 311
Carey v. Brown 313
Carr v. Carr 811, 813
Carroll v. United States 329, 336
Carroll v. Jacques Admiralty Law Firm, P.C. 601

Carter v. Carter Coal Co. 749
Carter v. State (1945) 110
Carter v. State(1946) 78-79, 141
Carter v. State(1998) 48, 112-13
Castano v. Am. Tobacco Co. 376, 385, 453
Caswell v. Caswell 808
Catchings v. State 107, 109
Chaffin v. State 129
Chamblee v. Chamblee 811, 813
Cheatham v. Cheatham 801
Chevron Chem. Co., *Ex parte* 679
Chevron U.S.A., Inc. v. Natural Res.
Def. Council 737, 749, 766-69, 775, 778
Chicago v. Berette U.S.A. Corp. 638
Children's Healthcare is a Legal Duty, Inc. v. Min De Parle 253
Children's Healthcare is a Legal Duty, Inc. v. Vladeck 246
Childs v. State 129, 136
Christensen v. State 704
Church of Lukumi Babalu Aye, Inc. v. Hialeah 244
Ciba-Geigy Corp. v. Murphree 598
Citizens to Preserve Overton Park, Inc. v. Volpe (1971) . 732, 734, 763, 778
Citizens to Preserve Overton Park, Inc. v. Volpe (1972) 778
City of Boerne v. Florez 307
City of Flagstaff v. Atchinson, Topeka & Sante Fe R. Co. 642
City of Philadelphia v. Lead Indus. Ass'n 666, 683
City of Tupelo v. Martin 697-99
Clanton v. State 909
Clark v. State 119-21, 139, 141, 145
Clark v. Williamson 392
Clark v. Wilson 635
Clayton v. State 109, 123-24, 126, 135, 141-42
Clemons v. Mississippi 83
Cobb v. Cobb 600
Coca-Cola Bottling Co. v. Reeves 390, 392
Coleman v. State 127
Collins, *In re* 2, 9, 27, 534
Collins v. Eli Lilly 680
Collins v. Mac-Millan Bloedel, Inc. 9, 27, 534
Comm. for Pub. Educ. v. Nyquist 314
Comm. for Pub. Educ. & Religious Liberty v. Regan 250, 270
Commonwealth v. Atencio 116
Commonwealth v. Chretian 828
Commonwealth v. State 116
Comstock v. Rayford 455
Conley v. Boyle Drug Co. 680

Conner v. State 910, 919
Connolly v. Pension Benefit Guar. Corp. 1033
Consumers Credit Corp. v. Stanford 699, 707
Cooper v. County of Rensselaer 683
Cooper Indus., Inc. v. Leatherman
Tool Group, Inc. 381, 569-72, 580, 595, 711-13, 721-28
Cooper Tire & Rubber Co. v. Tuckier 582-83
Coon v. State 221
Cooter & Gell v. Hartmarx Corp. 714
Coplin v. Francis 698
Corley v. State 955
Cornelius v. NAACP Legal Def. & Educ. Fund, Inc. 315
Cosey v. E.D. Bullard Co. 15, 545
County of Santa Clara v. Atl. Richfield Co. 666
Cox v. State 916
Craft v. State 986-87
Craig v. State 91-93, 127, 130, 136
Crawford v. State (1998) 83
Crawford v. State (2000) 980
Crawford v. State (2001) 915-16
Crawley v. Am. Pub. Life Ins. Co. 468-69
Criddle v. State 913
Criss v. State 48, 79
Crook Motor Co., Inc. v. Goolsby 602
Crooks v. Metro Life Ins. Co. 26
Crossley v. State 134
Crosswhite v. State 913-14, 989
Curtis v. Firth 827
Cutshall v. State 128, 130, 135-36

D

Daigle v. Daigle 784
Dalehite v. United States 701-02
Darby v. State 843-44, 882, 886, 906-07
Darry v. People 136
Daubert v. Merrell-Dow Pharm. 546
Davis v. Alaska 1001
Davis v. City of Cleveland 703
Davis v. State (1995) 958
Davis v. State (1996) 873
Davis v. State (1998) 983-84
Davis v. State (2001) 936-37
Day v. Day 783
Day v. State 878-79
Day v. Woodworth 720

Dearman v. Dearman 809
Decker v. O'Donne 1246
De la Beckwith v. State 961, 988
Delahanty v. Hinkley 645
Dendy v. State 127
Denver Area Educ. Telecomm. Consortium, Inc. v. FCC 312
Devine, *Ex parte* 807
Downs v. State 130
Dimick v. Schiedt 574
Dick v. State 194-95
Dickens v. State 79
Dickerson v. State 126, 128
Dillon v. Dillon 783
Dissolution of Marriage of Profilet, *In re* 801
Dixon v. State 69, 114-15
Dobbins v. State 108
Dobbs v. State 105
Doby v. State 985-86
Dolan v. City of Tigard 1033
Dow Chem. Co. v. United States 333-34
Dowda v. State 121-22
Downing v. United States 870
Driste v. Driste 803
Dungan v. Dick Moore, Inc. 594
Dunn v. Dunn 813
Duplantis v. State 957-58
Durr v. State 131
Dragon v. Cooper/T.Smith Stevedoring Co. 541
Dred Scott v. Sanford 175-76, 179, 212-14, 221, 226
Driste v. Driste 827
Ducking v. State 128-29
Duggins v. Guardianship of Wash. Through Huntley 599
Dunn v. Hovic 33-34
Dye v. State 79
Dynasteel Corp. v. Aztec Indus., Inc. 599

E

Eagle-Pitcher Indus. v. Am. Employers' Ins. Co. 538
Eakes v. State 910
East v. Collins 801
E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas 602
Edlin v. State 843, 881, 885-86, 889
Edwards v. Armstrong World Indus., Inc. 27
Edwards v. State (1998) 723 962

Edwards v. State (1998) 726 ..... 922, 935
Edwards v. State (1999) 737 ..... 83, 995-96
Edwards v. State (1999) 751 ..... 126, 135
EEOC v. Wal-Mart Stores, Inc. 720
E.I. du Pont de Nemours & Co. v. Robinson 546
Eichenseer v. Reserve Life Ins. Co. (1988) 602
Eichenseer v. Reserve Life Ins. Co. (1991) 601
Elliott v. Rogers 805
Employers Mut. Cas. Co. v. Tompkins 600
Engle v. Vitale 254
Ensminger v. Campbell 826
Ensminger v. Ensminger 826
Estate of Peacocke v. Peacocke 801
Estate of Reeves v. Owen 832
Euclid v. Ambler Reality Co. 1034
Evans v. State 125-26, 130, 136
Evans v. Thigpen 84
Everson v. Bd. of Educ. 308-09

F

Fairman v. State 109, 122, 145
FEC v. Mass. Citizens for Life, Inc. 286
FEC v. Nat'l Conservative PAC 286
Fed. Power Comm'n v. Hope Natural Gas Co. 749
Feldman v. Lederle Laboratories 679
Ferguson v. Ferguson 795-98, 802
Ferrell v. State 149
Field v. Clark 754
Finstad v. W.R. Grace & Co. 28
First Am. Nat. Bank of Iuka v. Mitchell 601
First English Evangelical Lutheran Church v. Los Angeles County, Cal1031
Fisher v. State 940
Flanagin v. State 141
Florence v. State 865
Florida v. Riley 333
Flowers v. State (1985) 105
Flowers v. State (2000) 855-56
Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA .. 661
Forbes v. State 914-15
Ford v. State (1989) 546 992-93
Ford v. State (1989) 555 899
Ford v. State (1999) 132
Fox v. State 864-65
Frambes v. State 125

Francis v. Franklin 48
Frazier v. Frazier's Ex'rs 185
Frazier v. State 128, 130
Fred's Stores of Miss. v. M & H Drugs 596, 598
Freeland v. Freeland 806
Fretwell v. Chaffin 703
Furman v. Georgia 81
Fury Imp. Inc. v. Shakespeare Co. 719

G

Gaddis v. State 132, 143
Gaidon v. Guardian Life Ins. Co. 467-68
Gallaspy v. Gallaspy 788
Galtney v. Wood 823
Ganim v. Smith & Wesson Corp. 639
Gandy v. State 127, 129-30
Gant v. State 126-27
Gardner v. Jones 594
Garland v. Rowan 211
Garnes v. Fleming Landfill, Inc. 29
Gasperini v. Ctr. for Humanities, Inc. 714-15
Gault, *In re* 1003
Gen. Motors Acceptance Corp. v. Baymon 581
Gentry v. State 109, 111, 114
George v. George 831
Gibson v. State 126, 129
Giovine v. Giovine 827
Givens v. State 951-52
Glidewell v. Hite 207
Godfrey v. Georgia 82
Goff v. State 142, 144, 841-42, 873
Goldblatt v. Town of Hempstead, N.Y. 1034
Goldman v. United States 330
Gollehon Farming v. United States 700
Good News Club v. Milford Cent. Sch. 305-08, 317-23
Goree v. State 853
Gorin v. Gorin 820
Goshen v. Mut. Life Ins. Co. 467-68
Gossett v. State 987
Goudy v. State 128
Govan v. Med. Credit Servs., Inc. 824-25
Grantham v. Miss. Dep't of Corr. 698
Grayned v. City of Rockford 310
Greater Boston Television Corp. v. FCC 778
Green v. Robinson 207

Green v. Sch. Bd. of New Kent County 1015-16
Green v. State 875
Greenlee v. State 148
Green Oil Co. v. Hornsby 717
Greer v. Spock 311
Gregg v. Georgia 81
Gregory v. State 134
Griffin v. Griffin 784
Griffin v. State 127
Grimes v. Pearl River Valley Water Supply Dist. 698
Grinnell v. State 125
Grizzle v. Travelers Health Network, Inc. 601
Groves v. Slaughter 206-08
Guest v. State 78
Guy v. Commonwealth Life Ins. Co. 602
Guy v. Guy 804

H

H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes, Inc. 465
Hague v. CIO 310
Haley v. State 941-42
Halliday v. Sturm, Ruger & Co. 678
Hamilton v. Accu-tek 645
Hamilton v. State 880
Hammonds v. Hammonds 803
Hancock v. State 132
Hansen v. State 994-95
Harding v. Town of Townshend 635
Harlow v. Fitzgerald 702
Harried v. State 125, 132
Harrington v. Harrington 813
Harris v. McRae 271
Harris v. State 993-94
Harrison v. State 944
Harry v. Decker 177-79, 235
Hartfield v. State 954
Hartley v. Hartley 814
Hartzler v. City of San Jose 699
Harveston v. State 872
Hatcher v. State 127
Haw. Fed. Asbestos Cases, *In re* 11, 550
Hawthorne v. State 78
Haynes v. Yale-New Haven Hosp. 635
Haynes v. State 893, 917, 994
Hazelwood Sch. Dist. v. Kuhlmeir 314

Heacock v. Heacock 827
Healy v. James 313
Heffron v. Int'l Soc'y for Krishna Consciousness, Inc. 312
Heidel v. State 142, 841, 870, 877-78
Heirn v. Bridault 219-22
Helfend v. S. Cal. Rapid Transit Dist. 635
Hemsley v. Hemsley 792, 797-98
Henderson v. Henderson 822-24
Henderson v. State 127
Henry v. United States 329
Henton v. State 898-900, 989, 992
Hesington v. Hesington's Estate 830
Hester v. State 142
Hetzel v. Prince William County, Va. 574
Hewlett v. State 846
Hickson v. State 889, 894-95
Hinds v. Brazealle 180-81
Hines v. Remington Arms Co., Inc. 678
Hinton v. Hinton 784, 790
Hinton v. Monsanto Co. 541
Hinton *ex rel.* Hinton v. Monsanto Co. 21
Hobson v. State 911-12, 988
Hodel v. Irving 1033
Hoffman v. Hoffman 810
Hogan v. State 918
Holladay v. Holladay 788
Holland v. Holland 808
Holland v. Mayfield 598
Holland v. State (1995) 928-29
Holland v. State (1997) 82
Holliday v. State 122
Holloman v. State 89, 127, 129
Hollon v. Hollon 811
Holmes v. State 966
Honda Motor Co., Ltd. v. Oberg 601, 720-21
Hoops v. State 920
Hopson v. State (1993) 615 126
Hopson v. State (1993) 625 972-73
Houston v. State 881, 884-85
Howard v. Howard 787
Hubbard v. Hubbard 804
Huber v. Taylor 545
Huddleston v. United States 904
Hudson v. State 113
Hughes v. State 79

Humphrey v. State 942
Hunt v. McNair 316
Hunt v. State (1989) 917-18
Hunt v. State (1996) 920
Hurns v. State 92, 107, 141-42, 144, 146, 957
Hyer v. Hyer 784
Hymowitz v. Eli Lilly & Co. 680
Hynum v. State 126, 129

I

Ill. Cent. R.R. Co. v. Hicklin 635
Indep. Life & Ins. & Acc. Ins. Co. v. Peavy 584, 599
Indian Towing Co. v. United States 701
Indus. Union Dep't v. Am. Petroleum Inst. 750-55, 760, 769
Ingraham v. Wright 714
Insolia v. Philip Morris, Inc. 376
Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc. 721
Int'l Union v. OSHA (1991) 755-57
Int'l Union v. OSHA (1994) 757-58
Israel v. Allen 830

J

Jabron v. State 136
Jackson Nat'l Life Ins. Co. v. Haggan 449, 461
Jackson Nat'l Life Ins. Co. Premium Litig., *In re* 460-61
Jackson, *Ex parte* 330
Jackson v. Glidden Co. 682
Jackson v. Johns-Manville Sales Corp. 602
Jackson v. State (1994) 142
Jackson v. State (1996) 76
Jackson v. State (1997) 960
Jackson v. State (2001) 876
James v. Herring 205
James v. James 801
James W. Sessums Timber Co., Inc. v. McDaniel 597-98
Jamison v. State 963-64
Jasper v. State 852
Jeff v. State 190-91
Jefferson v. Lead Indus. 680
Jenkins v. State 892-93, 933
Jesco, Inc. v. Shannon 600
Johns v. Johns 806
Johns v. State 924-25

Johnson v. ACandS 372-73
Johnson v. Kellam 635
Johnson v. State (1982) 150
Johnson v. State (1985) 108, 122, 141
Johnson v. State (1998) 879
Johnson v. United States 327, 331-32
Joint E. & S. Dists. Asbestos Litig., *In re* 7, 11, 532, 538
Jones v. Miss. Dep't of Transp. 700-01, 708
Jones v. State (1934) 115
Jones v. State (1962) 136
Jones v. State (1983) 131
Jones v. State (1996) 69, 134, 137
Jones v. State (1998) 141
Jones v. State (2000) 129
Jones v. United States 329
Jordan v. State (1856) 195-96
Jordan v. State (1987) 150
Josephine v. State 197-204
Joyce v. Von Arsdale 704
J.S., *In re* 1003
Juzwin v. Amtord Trading Corp. 26-27
J.W. Hampton Jr. & Co. v. United States 749, 754

K

Kavanaugh v. Carraway 812
Keeble v. United States 142
Keller v. Keller 788
Kelley v. R.G. Indus., Inc. 649
Kelly v. State (1999) 851-52
Kelly v. State (2000) 926-27, 971
Kennedy v. Kennedy 807, 825
Kent v. United States 1003
Kergosien v. Kergosien 788
Keys v. Guardian Life Ins. Co. 458
Keyes v. Keyes 800, 810
Kimball Laundry Co. v. United States 1038
Kimbrough v. Luma Linda Dev., Inc. 720
King v. Armstrong World Indus., Inc. 26
King v. King 800
King v. State 970
Kirby v. Kent 820-21
Knowles v. State 823, 934-35
Kolb v. State 861
Kovacs v. Cooper 282

Kumho Tire Co. v. Carmichael 546
Kurczi v. Eli Lilly 680
Kyllo v. United States 325-26, 335-40

L

Labella v. Labella 788
Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc. 663
Lackey v. State 75
Lambert v. State (1990) 909
Lambert v. State (1998) 978
Lamb's Chapel v. Ctr. Moriches Union Free
Sch. Dist. 250, 308, 311-13
Lancaster v. State 79
Lang v. Bay St. Louis/Waveland Sch. Dist. 705-06
Lanier v. State 150
Latiker v. State 134
Lawton v. Steele 1033
Lead Indus. Ass'n v. EPA 742, 745
Leaf River Forest Prods., Inc. v. Deakle 457-58
Lee v. State (1921) 75-76
Lee v. State (1942) 128
Lee v. State (1999) 941
Lee v. Weisman 316
Leech v. Cooley 187-88
Leedom v. State 939, 943
Leggett v. Simmons 205
Leiper v. Hoffman 217-19
Lemon v. Kurtzman 245, 249-50, 252-53, 272, 308, 314
Lenherr's Estate, *In re* 830
Lesley v. State 918
Lester v. State (1950) 130
Lester v. State (1998) 847, 862, 883, 888, 904, 921, 950-51
Leszinske v. Poole 830
Levy v. State 962-63
Lewis v. Jeffers 81-82
Lewis v. State 933-34, 950
Lichter v. United States 749
Life USA Holdings, Inc., *In re* 453
Limbaugh v. Limbaugh 808
Lindsey v. Ala. Tel. Co. 465
Lindsey v. State 896, 938
Liston v. Home Ins. Co. 603
Lockett v. State 917, 953
Loretto v. Teleprompter Manhattan CATV Corp. 1036-37

Louis Pizitz Dry Goods Co. v. Yeldell 716
Lovejoy v. State 977
Loving v. Virginia 830-31
Lucas v. S.C. Coastal Council 1032, 1036
L.W. v. McComb Separate Mun. Sch. Dist. 696, 704-05, 707-08
Lynch v. Donnelly 250, 308

M

MacDonald v. MacDonald 801-02, 805
Mack v. State 919-20, 982
Mackbee v. State 955-56
Magnolia Constr. Co. v. Miss. Gulf S. Eng'rs, Inc. 699, 707
Mahorner v. Hooe 211-12
Me. Right of Life Comm'n, Inc. v. FEC 286, 297
Maldonado v. Kelly 699, 707
Mallett v. State 107
Manning v. State 946
Mansell & Herbert's Case 75
Manuel v. State 142
Mapp v. Ohio 191, 329
Marble v. Marble 787
Marbury v. Madison 733
Mariche v. State 982
Marriage of Cray, *In re* 810
Martin v. Abbott Labs. 680
Marx v. Broom 453-54, 458
Massachusetts v. United States 1038
Mass. Asbestos Cases, *In re* 679
May v. State 933
Mayfield v. State 37, 69, 89, 124
Mayor of Vicksburg v. Vicksburg Printing & Publ'g Co. 415
McAdory v. McAdory 783, 811
McBride v. Gen. Motors Corp. 26
McCaffrey v. State 132, 137
McCullough v. State 853-54
McCune v. State 991-92
McCoy v. Cooke 828
McDaniel v. State (1847) 78
McDaniel v. State (1978) 148
McFarland v. State 867, 869-70
McGautha v. California 81
McDonald v. United States 329
McGuire v. McGuire 824
McHann v. McHann 800

McKee v. State 856-57
McKeiver v. Pennsylvania 1003
McKinney v. State 125-27
McLemore v. Riley's Hosp. 824
McNeal v. Adm'r of Estate of McNeal 822, 826
Meek v. Pittenger 253
Meredith v. Fair 1013
Merrill v. Navegar, Inc. 642-43
Metro. Life Ins. Co. Sales Practices Litig., *In re* 460
Metro-N. Commuter R.R. Co. v. Buckley 21, 23, 532-33
MIC Life Ins. Co. v. Hicks 583-84
Miller v. Lucks 830-31
Miller v. Miller 823
Miller v. State (1996) 97-98
Miller v. State (1998) 91, 122, 131, 136, 859-60
Mills v. Alabama 297-98
Miranda v. Arizona 191
Miss. Transp. Comm'n v. Rector 697
Mistretta v. United States 749, 777-78
Mitchell v. Mitchell 788-89
Mitchell v. Helms
..... 244-45, 249, 252-53, 255-56, 260, 266, 271-72, 308
Mitchell v. State (1989) 977
Mitchell v. State (1999) 931-32
Mitchell v. Wells 190, 223-29
Moak v. Moak 811
Mobile Oil Corp. v. MacQueen 17
Moe v. Dinkins 830
Mohundro v. Alcorn County 698, 705
Moore v. Am. Tobacco Co. 404
Moore v. City of E. Cleveland, Ohio 1034
Moore v. Moore 788
Moore v. R.G. Indus. 645
Moore v. State 127
Moorman v. State .....
Morgan v. City of Ruleville 697
Morgan v. State 860
Morial v. Smith & Wesson Corp. 638
Morrison v. Olson 410
Moss v. State 935
Motor Vehicle Mfr.'s Ass'n v. State Farm Mut.
Auto Ins. 745, 764, 766
Murray v. Murray 805
Mustilli v. Mustilli 827
Mut. Life Ins. Co. v. Estate of Wesson 600

Myers v. Guardian Life Ins. Co. 467

N

NAACP v. Alabama *ex rel.* Patterson 283
Nash v. Mobile & O.R. Co. 829
Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc. 663
Nat'l Life Ins.& Acc. Ins. Co. v. Miller 600
Nat'l Union Fire Ins. Co. v. Textron Fin. Corp. 571-72
Natural Res. Def. Council, Inc. v. EPA 742
Neal v. State 78
Nectow v. City of Cambridge 1034
Neighbors v. State 122
Neville v. Neville 803
Newell v. Cowan 205
Newsom v. State 839-41, 871, 876
N.Y.C. Coalition to End Lead Poisoning v. Koch 681
Nicholson *ex rel.* Gollott v. State (1994) 125
Nicholson *ex rel.* Gollott v. State (1996) 98
Nicholson v. State 840, 848-49, 978
Nicolaou v. State 49
Nixon v. Shrink Mo. Gov't PAC 286
NLRB v. Hearts Publ'ns, Inc. 766-67
Nollan v. Cal. Coastal Comm'n 1033
Norris v. State Council for Higher Educ. 1015
Northwest Ga. Reg'l Hosp. v. Wilkins 704

O

Odom v. State 952, 967-68
O'Keefe v. Loewen Group, Inc. 398, 403
Okla. Publ'g Co. v. Dist. Court 1001, 1003
Oliver v. State 222-23
Oliver v. United States 329, 333-34
Olmstead v. United States 330
Or. Laborers-Employers Health & Welfare Trust Fund. v. Philip Morris, Inc. 642
Ornelas v. United States 715
Orr v. Orr 802, 823, 826
Ortiz v. Fibreboard Corp. 33, 531, 548
Ott v. State (1998) 930
Ott v. State (1999) 924
Outlaw v. State 107, 111-121, 142
Overberg v. Lusby 827
Owen v. Gerity 783
Owens-Illinois v. Edwards 454

P

Pac. Mut. Life Ins. Co. v. Haslip
. . . . . 385, 399, 569, 593, 595, 601, 715-17
Palmer v. Clarksdale Hosp. 829
Palsgraf v. Long Island R.R. 683
Paracelsus Health Care Corp. v. Willard 580-81
Parker v. Parker 784
Parker v. State 943-44
Panama Ref. Co. v. Ryan 735, 748, 750, 752, 754
Patenaude, *In re* 11
Patrick v. State 127
Payton v. United States 331
Pearl Pub. Sch. Dist. v. Groner 700
Pears v. State 112
Penn Cent. Transp. Co. v. New York City 1033-34
Perkins v. F.I.E. Corp. 645
Perkins v. State 913
Pa. Coal Co. v. Mahon 1031
People v. Gomez 112
People v. Rector 67
People v. Roe 116
People v. Watson 112
Perrott v. Shearer 635
Perry v. State 993
Perry Educ. Ass'n v. Perry Local Educators' Ass'n 309-13
Peter v. State (1839) 189
Peter v. State (1844) 191-93
Peterson v. State 889
Phillips v. New England Life Ins. Co. 467
Phillips v. Phillips 812
Phillips v. State (1980) 134
Phillips v. State (2001) 47-48, 113
Phillips v. Wash. Legal Found. 1034, 1038
Pike v. Pike 812
Pleasant v. State 921
Plummer v. State 61
Polk v. Sexton 596
Potts v. State 968
Poyner v. Gilmore 700
Pratt v. Pratt 803
Price v. State 965
Progressive Cas. Ins. Co. v. Keys 601
Prudential Ins. Co. of Am. Sales Practices Litig., *In re* 460

Puckett v. State 863
Pruett v. City of Rosedale 698
PruneYard Shopping Ctr. v. Robins 1037
Purjet v. Hess Oil V.I. Corp. 22
Puryear v. Tanfoglia Compania, S.P.A. 678
Pustejovsky v. Rapid Am. Corp. 14

Q

Quest Med., Inc. v. Apprill 601

R

Rawlings v. Kentucky 332
Raymark Indus. v. Stemple 550
Reed v. State 915
Reich v. Jesco, Inc. 420
Reynolds v. State 971
Rhone-Poulenc Rorer, Inc., *In re* 385
R. v. Martineau 147
Racich v. Celotex Corp. 26
Rakas v. Illinois 330, 334
Regina v. Sere 79
Reynolds v. State 125
Reynolds v. United States 309
Rhodes v. R.G. Indus. 645
Rice v. Sch. Dist. 703
Rice v. State 125
Rios v. United States 329
Roberson v. State (1928) 141
Roberson v. State (1972) 113-14,132
Robert v. State 974-75
Roberts v. Roberts 820
Robertson v. State 133
Robinson v. Robinson 825-26
Robison v. Robison 788, 813
Robinson v. State (1986) 953
Robinson v. State (1990) 871, 874-75
Robinson v. State (1999) 895
Rodgers v. State 926
Roe v. Wade 71, 87
Roemer v. Bd. of Pub. Works 248, 252, 269, 314
Rogers v. State 150
Rogisnky v. Richardson-Merrell, Inc. 29
Rose v. State 845
Rosenberger v. Rector & Visitors 261, 308, 315-16

Ross-King-Walker, Inc. v. Henson 468, 596, 598
Ross v. State 38
Ross v. Vertner 182-86
Rowe v. State 848, 859
Rowland v. State 151
Rowlett v. State 865-66
Rowley v. First Columbia Life Ins. 602
Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C. 34
Ruffin v. State (1947) 127
Ruffin v. State (1984) 150-51
Rushing v. Rushing 813
Russell v. State (1992) 872-73
Russell v. State (2001) 78, 110
Ruttley v. State 108, 114

S

Sabater v Lead Indus. Ass'n 678
Sadler v. Lee 820-21
St. Joseph's Stock Yard Co. v. United States 251
St. Louis, I.M. & S. Ry. Co. v. Craft 715
Sam v. State 196
Sam Shainberg Co. v. Barlow 391-92
Sanders v. State (1996) 972, 974
Sanders v. State (2000) 868-69
Sanders v. State (2001) 122, 143-45
Sanguinetti v. United States 1036
San Paolo U.S. Holding Co. v. Simon 572
Santa Fe Indep. Sch. Dist. v. Doe 252, 262
Santiago v. Sherman-Williams Co. 680
Saunders v. State 923-24, 963
Schall v. Martin 1003
Sch. Asbestos Litig., *In re* 535
Sch. Dist. v. Schempp 245, 254, 260, 269, 308
Scordino v. Hopeman Bros., Inc. 456
Scott v. Scott 807
Scott v. State (1938) 130
Scott v. State (1984) 97-98, 140
Scruggs v. State 898, 902, 932
Seafarers Welfare Plan v. Philip Morris, Inc. 642
Sellers v. Harris County 1035
Serpentine v. State 191
Sessums v. Northtown Limousines, Inc. 598
Settles v. State 905, 907-09
Shaffer v. Heitner 721
Shaffer v. State 111

Shaw v. Brown 216
Shaw v. State 954
Shekan v. Davidson Co. 824
Shell v. Mississippi 83
Shingleton v. Armor Velvel Corp. 602
Shows v. State 125, 130
Silkwood v. Kerr-McGee Corp. 717
Simmons v. Pacor, Inc. 12
Simpson v. Poindexter 829
Sims v. Fidelity Fin. 370
Sims v. State 124, 128
Sinclair Paint Co. v. Bd. of Equalization 684
Sindell v. Abbott Labs. 680
Sitton v. State 86
Skipworth v. Lead Paint Ass'n 680
Smith v. Daily Mail Publ'g Co. 1001, 1003
Smith v. Dorsey 599
Smith v. Maryland 335
Smith v. Smith (1988) 827
Smith v. Smith (1995) 821
Smith v. State (1945) 125-26, 130, 137
Smith v. State (1949) 48-49, 79
Smith v. State (1959) 108
Smith v. State (1981) 828
Smith v. State (1995) 656, 887-88, 893-94, 929
Smith v. State (1998) 716, 941
Smith v. State (1998) 724, 911, 946
Smith v. State (1998) 729, 947
Smith v. State (1998) 122
Smothers v. State 966-67
Snider v. State 989
Snyder v. Massachusetts 717
Solem v. Helm 386
Spraggins v. State 845
Sproles v. Sproles 788
Stanford v. Stanford 825
State Farm Mut. Auto. Ins. Co. v. Daughdrill 602
State Farm Mut. Auto. Ins. Co. v. Grimes 581, 594
State v. Lead Indus. Ass'n 413
State v. Jones 58, 176-77
State v. Perkins 870
State v. Mary Doherty 1004, 1006
State v. Proctor 69
State v. Wakefield 870
State v. Willis 87

State Farm Mut. Auto Ins. Co. v. Daughdrill 600
Steagald v. United States 327
Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc. . 642
Steen v. Steen 825
Stephens v. Combustion Eng'g, Inc. 371-72
Stevenson v. Renardet 820
Stewart v. State 867-68
Stoner v. Colvin 455
Stoop v. State 877
Stribling v. Stribling 784
Strickland v. State 990-91
Strode v. State 134
Sudeen v. Castlebury 596, 598
Sullivan v. Stringer 812-13
Sumrall v. State 932-33
Swington v. State 931, 943-44
Sykes v. State 925

T

Tait v. State 116-19, 133, 139-40
Talbert v. Talbert 789
Talbut v. State 114
Tangipahoa Parish Bd. of Educ. v. Freiler 259
Tatum v. Barrentine 483-84
Taylor v. State (1984) 148
Taylor v. State (2001) 78, 97
T.C.L., Inc. v. Lacoste 600
Temple-Inland Forest Prods. Corp. v. Carter 21, 22
Terpstra v. Terpstra 810
Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. 572
Thibodeaux v. State 98
Thomas v. Fidelity Fin. 370
Thomas v. Harrah's Vicksburg Corp. 598
Thomas v. Winchester 124
Thompson v. Thompson 825
Tilley v. Tilley 801, 804
Tilton v. Richardson 260, 269
Time Warner Entm't Co. v. Six Flags Over Ga. 572
Time Warner Entm't Co. v. Six Flags Over Ga., LLC 572
Tinker v. Des Moines Indep. Cmty. Sch. Dist. 309
T.M. v. Noblitt 704
Tolbert v. State 871, 873-74
Tomkins v. State 976-77
Tompkins v. State 981

Torgeson v. Schultz 639
Touby v. United States 747-49
Towner v. State 126, 133, 136, 140, 145
Townsend v. State 959
Tran v. State 78, 108, 113
Tribbette v. Ill. Cen. R. Co. 447, 454
Tribble v. Tribble 829
Trietley v. Bd. of Educ. 312
Trotter v. McCall 216-17
Turnage v. State 964-65
Turner v. State 133
Turner v. Turner 817
Tran v. State 976
TXO Prod. Corp. v. Alliance Res. Corp. 569, 717-19

U

Underwood v. State 945, 961
United States v. 564.54 Acres of Land 1038
United States v. Bajakajian 714
United States v. Beechum 886
United States v. Big D Enter. 719
United States v. Black Elk 99
United States v. Bonanno Organized Crime Family 665
United States v. Causby 1035, 1037
United States v. CIO 277-78, 283, 298
United States v. Cress 1036
United States v. Cusumano 328
United States v. DeJohn 928
United States v. Fleet Factors Corp. 776
United States v. Fleming 112
United States v. Fordice 1011-19, 1024
United States v. Gaubert 700, 702
United States v. Gen. Motors Corp. 1037
United States v. Grace 310-11
United States v. Hinkle 100
United States v. Ishmael 328
United States v. Karo 330-32
United States v. Katz 328-30, 335
United States v. Knott 331-33
United States v. Milton 100
United States v. Myers 328
United States v. O'Brien 282
United States v. Pinson 328
United States v. Place 332

United States v. Silva 886
United States v. Sperry Corp. 1038
United States v. Shaw 99
United States v. Southwestern Cable Co. 744
United States v. Standard Oil 664
United States v. Stover 927
United States v. United States Dist. Court 331

V

Valley Forge Ins./CNA v. Strickland 594, 596, 599
Van Buren v. State 193-94
Van Lom v. Schneiderman 720-21
Vasallo v. Baxter Healthcare Corp. 679

W

Wade v. Am. Colonization Soc'y 182, 186-87
Walker v. State 149
Walker v. Walker 803
Wallace v. Jaffree 250, 264, 316
Walls v. USF&G Ins. Co. 461, 466, 470-71
Walton v. State 80
Warren v. State 946
Washington v. State 912
Wash. Legal Found. v. Legal Found. of Wash. 1033
Wash. Legal Found. v. Mass. Bar. Found. 1033-34
Wash. Legal Found. v. Tex. Equal Access to
Justice Found. 1029-31, 1038-44
Watkins, *Ex parte* 714
Watson v. Duncan 820
Watts v. Watts 807
Watts v. State (1994) 846
Watts v. State (1998) 849
Wayman v. Southard 730
Weathersby v. State 133, 969
Weaver v. State 990
Webb's Fabulous Pharmacies, Inc. v. Beckwith 1034-35
Webster v. State 901
Weems v. United States 386
Weigland v. Houghton 813
Welch v. Welch 804
Wells v. Panola County Bd. of Ed. 420
Wells v. State 70
W. R. Grace & Co., *In re* 5
W. Va. Asbestos Pers. Injury Litig., *In re* 543

W. Va. Bd. of Educ. v. Barnette 262
West Virginia *ex rel.* Appalachian Power Co. v. MacQueen 17, 18
Westbrook v. State 970
Wheeler v. State 114, 139
Wheeler v. State 114, 950, 955
White v. City of Tupelo 697
White v. State 897
White v. Thompson 813
Whitehouse v. Lead Indus. Ass'n 666
Whitehurst v. State 126, 143
Whitman v. Am. Trucking Ass'ns 734, 758-62, 769, 771
Whittington v. Whittington 599
Widmar v. Vincent 311, 313-14
Wilbourne v. Wilbourne 789, 825
Wilcher v. State 908
Wiley v. Gray 820
Wilhite v. State 903-04, 927
Wilkins v. State 891-92
Wilks v. Sunstar Acceptance Corp. 370
Will of Johnson, *In re* 821
Willard v. Paracelsus Heath Care Corp. 594
Williams v. A.P. Green Indus., Inc. 16
Williams v. Illinois 717
Williams v. State (1931) 128
Williams v. State (1996) 134
Williams v. State (1999) 113
Williams v. State (2002) 975
Willie v. State 909-10, 945
Willis v. State 87
Wilson v. State 127-28
Wilson v. Wilson 788-89
Wiltcher v. State 978-79
Windham v. State (1987) 150
Windham v. State (1992) 35, 107-11, 120, 122-23, 132, 141, 151
Winfield v. Winfield 800, 810, 812
Winship, *In re* 1003
Wires v. Wires 785-86
Woods-Drake v. Lundy 602
Wolman v. Walter 253, 272
Wong Sun v. United States 196
Wood v. State 96
Wood v. Wyeth-Ayerst Labs 541
Woolbert v. Lee Lumber Co. 824
Wray, *Ex parte* 78

Wright v. Tate 636
Wyatt v. Wyatt 821

X

Y

Yakus v. United States 749
Yates v. Yates 811
Yee v. City of Escondido, Cal. 1036
Young v. Am. Mini Theaters, Inc. 312

Z

Zablocki v. Redhail 830
Zinser v. Accufix Research Inst. 453
Zobrest v. Catalina Foothills Sch. Dist. 255-56

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